CLERK'S CUP

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 161

8

CLARENCE A. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN R. STEWART; DECEASED, PETITIONER,

vs.

SOUTHERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 13, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.



United States Circuit Court of Appeals BIGHTH CIRCUIT.

No. 11,609

CIVIL.

SOUTHERN RAILWAY COMPANY, A CORPOBA-TION, APPELLIANT,

VR.

CLARENCE A. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN R. STEWART, DECEASED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 28, 1939.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit.

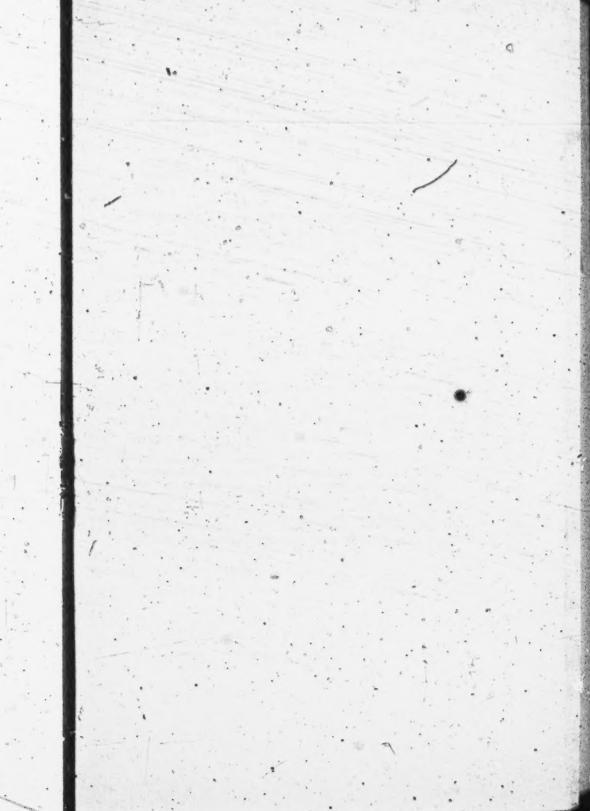
Attest:

E. E. KOCH.

(Seal)

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit, on the twentyeighth day of October, A. D. 1939, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Southern Railway Company, a Corporation, was Appellant, and Mary Stewart, Administratrix of the Estate of John R. Stewart, Deceased, was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:



[fol. 1] Notice of Appeal to the Circuit Court of Appeals Under Rule 73 (b).

(Filed Sept. 19, 1939.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff, No. 12154 vs. Div. No. 2.

Southern Railway Company, a corporation, Defendant.

Notice Is Hereby Given that Southern Railway Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on June 13, A. D., 1939, which became final on August 24, 1939, on overruling motion for a new trial or for judgment notwithstanding the verdict.

SOUTHERN RAILWAY COMPANY, By Arnot L. Sheppard, Walter N. Davis,

> Union Station, St. Louis, Missouri.

Wilder Lucas,
620 Rialto Building,
St. Louis, Missouri.
Attorneys for Appellant,
Southern Railway Company,
a corporation.

[fol. 2]

Petition.

(Filed April 20, 1937)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

To the March Term, 1937.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff,
No. vs. Div. 12154

Southern Railway Company, a corporation, Defendant.

Plaintiff states that the above-named defendant is and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of law owning and operating railroad properties in this state and elsewhere, and is now and at the times hereinafter mentioned was a common carrier by railroad, and plaintiff further states that while the said defendant was engaging in commerce between two or more of the several states of the United States one John R. Stewart, now deceased, was on the 12th day of February, 1937, injured in such a manner and to such extent while he was employed by the defendant in such commerce that he died as a result thereof on the 14th day of February, 1937. Such injuries and death was a direct result of defects and insufficiencies in defendant's cars and appliances thereof.

Plaintiff further states that on or about the 12th day of February, 1937, at East St. Louis, Illinois, the deceased was employed by defendant as a switchman, and on said [fol. 3] date was coupling up certain cars on track known as No. 12 in its yards; that one or more of said cars deceased was coupling and switching contained goods, wares and merchandise then upon defendant's lines which were en route from various states of the United States to various other states of the United States; and the deceased at the time he received his mortal injuries was engaged in interstate commerce with defendant. That defendant at the time deceased was injured was using, hauling and permitting to be hauled and used on its lines and its railroads, which lines and railroads were engaged in interstate commerce, cars used in moving interstate traffic and used on railroads engaged in interstate commerce and used

in connection with trains, locomotives, engines, cars and similar vehicles used on railroads engaged in interstate commerce, the cars between which John R. Stewart, the deceased, was working when he received the mortal injuries herein complained of, which cars were not equipped with couplers coupling automatically by impact and which could be coupled without the necessity of men going between the ends of the cars in violation of the laws of the United States and of the Safety Appliance Act of March 2, 1893, 37 Statutes at Large 531, Chapter 196, as amended by Act of March 2, 1903, 32 Statutes at Large 943, Chapter 976, so that at the time deceased was injured it was necessary for him in the exercise of his ordinary duties as a switchman for defendant in order to couple the said cars to go between the ends of same for the purpose of coupling them, and while he was between the ends of said cars preparing the couplers for the purpose of coupling the cars, the cars were moved, crushing the arm of the plaintiff in such a manner as to cause his death two days later on the 14th of February, 1937.

[fol. 4] Plaintiff alleges that the injuries and death of the deceased were direct results of the violation on the part of defendant of the Statute herein before referred to.

Plaintiff further states that the arm and body of deceased were severely crushed, and that he suffered greatly from shock, that he suffered consciously great and excruciating pain and anguish for over two days from the time he was injured to the time he expired.

Plaintiff further states that John R. Stewart, now deceased, left surviving him a widow, Mary Stewart, who was dependent upon him for support and who has suffered pecuniary loss by reason of his death. That the mid Mary Stewart at the time of the death of John R. Stewart and prior thereto was his wife, and deceased did not leave surviving him any other wife or minor children than the ones named above, and the plaintiff further states that she is the duly appointed, qualified and acting administratrix of the estate of John R. Stewart, now deceased, and is his personal representative, and that this action is brought [fror] the benefit of herself as widow under the Federal Employers Liability Act.

Wherefore, plaintiff states that the damages sustained by John R. Stewart on account of the conscious pain suffered by him prior to his death aforesaid amounts to the sum of Ten Thousand Dollars (\$10,000.00), and the pecuniary loss sustained by reason of the death of John R. Stewart by Mary Stewart for whose benefit this action is brought is Fifty-Five Thousand Dollars (\$55,000.00), and that the total damage sustained by plaintiff as the personal representative of John R. Stewart is the total sum of Sixty-Five Thousand Dollars (\$65,000.00), and plaintiff [fol. 5] prays judgment—for said amount together with her costs herein.

CHAS. P. NOELL.

[fol. 6] (Summons and Marshal's Return.)

United States District Court

Eastern Division, Eastern District of Missouri.

The President Of The United States Of America,

To the Marshal of the Eastern District of Missouri,— Greeting:

You Are Hereby Commanded, That you summon Southern Railway Company, a corporation late of your District, if it may be found therein, so that it be and appear within twenty days after service of this summons before the United States District Court for the Eastern District of Missouri, at St. Louis, Mo., to plead, answer or demur to petition of Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased.

And have you then and there this writ. Returnable May 10, 1937.

Witness, the Honorable Geo. H. Moore, United States District Judge at St. Louis, Missouri, this 20th day of April, A. D. 1937.

JAMES J. O'CONNOR, Clerk.

By Clara Redmond,

Deputy Clerk.

(Seal)

Marshal's Return,

I Hereby Certify that in St. Louis, Missouri, on the 3rd day of May, 1937 I executed the within writ by serving the same on the within named Southern Railway Company, a corporation, by delivering a true and correct copy of Summons together with a copy of Petition in this cause annexed as furnished by the Clerk of the Court to Mr. L. H. Woodall, Assistant General Manager, of the within-named Southern Railway Company, a corp., no higher officers being present at the time of service.

WILLIAM B. FAHY, United States Marshal.

Marshal's fees \$4.06.

S. Cortopassi,

Deputy.

Endorsed: Filed May 4, 1937, Jas. J. O'Connor, Clerk.

[fol. 8] Docket Entry Showing Filing of Answer by Defendant.

May 24, 1937.

· Answer of defendant to plaintiff's petition filed.

[fol. 9] Second Amended Answer to Plaintiff's Petition. (Filed March 20, 1939.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff,
No. 12154. vs.

Southern Railway Company, a corporation, Defendant.

Comes now the defendant and, leave of Court first being had and obtained to plead, for its second amended answer to plaintiff's petition filed herein, denies each and every allegation in said petition contained.

Further answering defendant, Southern Railway Company says that the plaintiff herein was duly appointed Administratrix of the estate of John R. Stewart, deceased, by the Probate Court of St. Clair County, State of Illinois, on or about April 16, 1937, as shown by a copy of letters of administration herewith attached and made a part hereof and marked Exhibit "A" and that thereafter and on or about April 20, 1937, plaintiff as such Administratrix filed a suit for damages against defendant in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and that, thereafter, she did file in the Probate Court of the County of St. Clair, State of Illinois, a petition duly signed and verified by her, in and by which petition plaintiff represented that the defendant had offered and agreed, provided a full release could be obtained, to pay to said petitioner as administratrix of the estate of John R. Stewart, deceased, the sum of Five Thousand Dollars (\$5,000.00) in full settlement of all claims and demands on account of the fatal injuries to said deceased; and prayed that an order be entered in said Court approving said settlement and authorizing and directing the petitioner as such Administratrix to make such [fol. 10] settlement, and, upon payment to her of Five Thousand Dollars, to execute and deliver to said Southern Railway Company a release in writing, fully releasing, settling, satisfying and determining all claims, demands and rights of action of every kind, nature and description which she, as such administratrix of said estate had on account of the fatal injuries to said deceased; a copy of said petition so filed in said Probate Court is hereto attached and made a part hereof and marked Exhibit "B". That on November 30, 1937, after said petition was presented to said Probate Court, an order was entered in and by said Probate Court, in and by which said settlement was approved, and authorized the said plaintiff, as such administratrix, upon receipt of the sum of Five Thousand Dollars to settle said claim and to execute and deliver to the Southern Railway Company a full and complete release, settling, satisfying and discharging all claims, demands, actions and causes of action of every kind nature and description which she, the said administratrix of said Estate had/ against said Southern Railway Company on account of the fatal injuries to said John R. Stewart, deceased, a copy of which order is hereto attached and made a part hereof and marked Exhibit "C". That after said order was so entered by said Probate Court, and on November 30, 1937, the said Mary Stewart as administratrix of the Estate of

John R. Stewart, deceased was paid the sum of Five Thousand Dollars by said Southern Railway Company and that receipt of said Mary Stewart, as such administratrix, executed a release to defendant, releasing and discharging it from all claims, demands, actions and rights of action that she then had or might thereafter have against defendant herein by reason of the fatal injuries to the said John R. Stewart, deceased, and in and by said release the said administratrix as such specifically accepted the sum of Five Thousand Dollars in full settlement of this suit. A copy of the release so signed by said Mary Stewart, administratrix of the Estate of John R. Stewart, deceased, is hereto attached and made a part hereof and marked Exhibit "D"; and a copy of the check for Five Thousand Dollars, which was given to the said Mary Stewart, as such administratrix, in consideration of said release, was thereafter cashed by said Mary Stewart as administratrix of the [fol. 11] Estate of John R. Stewart, deceased, and she received the money thereon and appropriated it to her use as such administratrix, is herewith attached and made a part hereof and marked Exhibit "E".

Thereafter on or about December 10, 1937, the said Mary Stewart filed in the Probate Court of St. Clair County. State of Illinois, a petition to set aside the settlement of her claim as such administratrix against defendant herein: a copy of which petition is herewith attached and made a part hereof and marked Exhibit "F". Thereafter said defendant herein filed a motion to intervene in the matter of setting aside the said settlement, a copy of which is hereto attached and made a part hereof, and marked Exhibit "H" and thereafter on January 31, 1938 said motion was granted, as shown by a copy herewith attached and made a part hereof and marked Exhibit "I". Thereafter on January 31, 1938, in the Probate Court of St. Clair County, Illinois the motion of Mary Stewart, as administratrix of the Estate of John R. Stewart, deceased to set aside approval of settlement for fatal injuries to her decedent was by said Probate Court of St. Clair County, State of Illinois, denied, a copy of which is hereto attached and made a part hereof and marked Exhibit "J".

Wherefore having fully answered defendant prays to be hence discharged with its costs.

WILDER LUCAS, WALTER N. DAVIS, Attorneys for Defendant.

[fol. 12]

Exhibit A.

Letters of Administration.

State of Illinois, County of St. Clair.—ss.:

The People Of The State Of Illinois To All To Whom These Presents Shall Come—Greeting:

Know Ye, That, whereas, John R. Stewart of the County of St. Clair, and State of Illinois, died intestate as it is said, on or about the 14th day of February A. D. 1937, having at the time of his decease, personal property in this State, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same.

To The End, Therefore, that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Mary Stewart of the County of St. Clair, and State of Illinois, Administratrix of all and singular the goods and chattels, rights and credits, which were of the said John R. Stewart at the time of his decease; with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now are, or hereafter may be required of her by law.

Witness, L. O. Reinhardt, Clerk of the Probate Court, in and for said County of St. Clair, at his office in Belleville, this 16th day of April A. D. 1937 and the seal of said Court hereunto affixed.

(Official Seal)

L. O. REINHARDT, Clerk of the Probate Court. By E. C. Schobert,

Deputy.

[fol. 13] State of Illinois, St. Clair County.—ss.:

I, L. O. Reinhardt Clerk of the Probate Court of said County, Do Hereby Certify, that the within and foregoing is a true copy of the original Letters of Administration issued to Mary Stewart as Administratrix of the Estate of John R. Stewart Deceased, as fully as the same appear of Record in my Office, in Administrator's Record Book 38 at Page 45. And I further certify that said Letters of Administration are now in full force and effect.

Given under my hand and the seal of said Court, this 20th day of April A. D. 1937.

L. O. REINHARDT, Clerk of the Probate Court. By Jerome J. Mackin, Deputy.

(Seal)

[fol. 13a] (Exhibit B to Second Amended Answer.)

Exhibit B attached to the Second Amended Answer is the Petition of Mary Stewart, as Administratrix, etc., and said exhibit is omitted at this place in the printed record in order to avoid duplication inasmuch as it is the same as Defendant's Exhibit 1 appearing at folio page 128 of this printed record.

(Exhibit C to Second Amended Answer.)

Exhibit C attached to the Second Amended Answer is the Order of the Probate Court approving settlement In the Matter of the Estate of John R. Stewart, deceased, and said exhibit is omitted at this place in the printed record in order to avoid duplication inasmuch as it is the same as Defendant's Exhibit 4 appearing at folio page 151 of this printed record.

(Exhibit D to Second Amended Answer.)

Exhibit D attached to the Second Amended Answer is the Release of Mary Stewart, Administratrix, etc., et al., to Southern Railway Company, dated November 30, 1937, and said exhibit is omitted at this place in the printed record in order to avoid duplication inasmuch as it is the same as Defendant's Exhibit 2 appearing at folio page 131 of this printed record.

(Exhibit E to Second Amended Answer.)

Exhibit E attached to the Second Amended Answer is the Voucher of the Southern Railway Company to Mary Stewart, Administratrix, etc., for \$5,150.00, dated Novemvember 30, 1937, and said exhibit is omitted at this place in the printed record in order to avoid duplication inasmuch as it is the same as Defendant's Exhibit 3 appearing at folio page 133 of this printed record.

(Exhibit F to Second Amended Answer.)

Exhibit F attached to the Second Amended Answer is the Petition of Mary Stewart, Administratrix, to set aside Order of Probate Court authorizing settlement, and said exhibit is omitted at this place in the printed record in order to avoid duplication inasmuch as it is the same as Defendant's Exhibit 5 appearing at folio page 155 of this printed record.

(Exhibit H to Second Amended Answer.)

Exhibit H attached to the Second Amended Answer is the Application of Southern Railway Company for leave to Intervene at hearing on Motion of Mary Stewart, Administratrix, etc., to set aside Order of Settlement, and said exhibit is omitted at this place in the printed record in order to avoid duplication inasmuch as it is the same as Defendant's Exhibit 7 appearing at folio page 158 of this printed record.

[fol. 14]

Exhibit I.

State of Illinois

St. Clair County—ss.:

In the Probate Court

In the matter of

The estate of John R. Stewart, deceased.

November Term, A. D. 1937.

November 30, A. D. 1937.

Petition of the administratrix for authority to compromise for claim of wrongful death of deceased, presented.

Ordered that administratrix be authorized to compromise claim as per written order on file.

December Term A. D. 1937.

December 10, A. D. 1937.

Petition of Mary Stewart to set aside order on compromise presented. Hearing on petition set for January 7th, 1938, 9 A. M. Clerk to notify petitioner.

January Term A. D. 1938.

January 31, A. D. 1938.

Petition of the Southern R. R. Co., to intervene in the motion heretofore filed in behalf of Mary Stewart, administratrix, to set aside settlement for wrongful death of the deceased. Motion granted.

Motion of Mary Stewart to set aside approval of settlement for fatal injuries to her decedent, denied.

[fol. 15] State of Illinois, St. Clair County.—ss.:

I L. O. Reinhardt Clerk of the Probate Court, and keeper of the records and files thereof in and for said County, in the State aforesaid, do hereby certify the foregoing to be a true, perfect and complete copy of petition of Mary Stewart to set aside order on compromise on settlement in the matter of the estate of John R. Stewart, deceased, also petition of Southern Railway Company to intervene in the motion heretofore filed in behalf of Mary Stewart, administratrix, of the estate of John R. Stewart, deceased, also copy of orders of the Probate Court in the matter of the estate of John R. Stewart, deceased.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Belleville, this 13th day of March A. D. 1939.

L.O.	RI	GI.	NH	AI	RD	T.
1.					,	Clerk.
Ву						
1			**		D	eputy.

(Seal)

State of Illinois, St. Clair County.—ss.:

I, Paul H. Reis Judge of the Probate Court of St. Clair County, Illinois, do hereby certify that L. O. Reinhardt whose name is subscribed to the foregoing Certificate of Attestation, now is and was at the time of signing and sealing the same, Clerk of the Probate Court of St. Clair County aforesaid, and keeper of the Records and Seal thereof, duly elected and qualified to office, that full faith and credit are, and of right ought to be given to all his official acts as such, in all Courts of record and elsewhere, and that his said attestation is in due form of law, and by the proper officer.

Given under my hand and seal this 13th day of March A. D. 1939.

(Seal)

PAUL H. REIS, (Seal)
Judge of the Probate Court.

State of Illinois, St. Clair County.—ss.:

I, L. O. Reinhardt Clerk of the Probate Court, in and for said County, in the State aforesaid, do hereby certify that Paul H. Reis, whose genuine signature appears to the foregoing certificate, was at the time of signing the same and now is Judge of the Probate Court of St. Clair County, Illinois, and sole presiding Judge of said Court, duly commissioned and qualified; that full faith and credit are, and of right ought to be given to all his official acts as such, in all Courts of record and elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed seal of said Court, at my office in Belleville, this 13th day of March A. D. 1939.

L. O. REINHARDT,
Clerk.
By.....

(Seal)

Deputy.

Copy

[fol. 16]

Reply.

(Filed May 27, 1938, Refiled May 31, 1939.

In the District Court of the United States For the Eastern Division of the Eastern Judicial District of Missouri.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff, No. 12,514. vs. Div....

Southern Railway Company, a corporation, Defendant.

Comes now the plaintiff above named and for reply to the amended answer of plaintiff filed herein admits that she is the duly appointed administratrix of the estate of John R. Stewart, deceased, and admits that she filed suit for damages against the defendant in the United States District Court For the Eastern Division of the Eastern Judicial District of Missouri, and admits that she signed the documents referred to in paragraph two of defendant's amended answer, and denies each and every other or additional allegation in said paragraph contained.

For other and further reply plaintiff states that soon after the filing of this suit the claim agents and representatives of this defendant railway company began and thereafter continuously [practised] a calculated and designed procedure and course of duress, harassment, oppression, and annoyance of the plaintiff which was intended to and did obtain from the plaintiff the documents referred to in the defendant's amended answer.

Plaintiff further states that the defendant obtained the documents referred to in defendant's amended answer by means of fraud and duress and that her signature to each and every of said documents referred to in defendant's amended answer was affixed to said documents as a result of false and fraudulent statements and representations made to plaintiff by the defendant's agents, attorneys, and [fol. 17] claim agents and as a part of the [practised] course and calculated design of the defendant to settle plaintiff's cause of action against the defendant without permitting the plaintiff to have any advice or aid of counsel, and for a sum of money which was wholly inadequate

and insufficient to compensate the plaintiff for the damages she had suffered.

Plaintiff further states that in conjunction with and as a part of the calculated harassment, fraud, duress, and design of the defendant to settle said cause of action with out permitting the plaintiff aid of counsel and in order to settle said cause of action for an inadequate and inconsequential sum the defendant by and through its agents, attorneys, and claim agents were guilty of the following actions and conduct toward the plaintiff, to-wit:

That during nearly all the pendency of this suit she has been from time to time and upon numerous occasions harassed and spied upon by said attorneys and claim agents of defendant in an effort on their part to wrongfully induce plaintiff to settle her cause of action against the defendant, without the advice of her counsel and without his knowledge or consent, for an amount greatly disproportionate to that which she is entitled to recover herein, and that for such purpose said attorneys and claim agents of defendant have, during the pendency of this suit, followed plaintiff to places and cities where she went from her home in East St. Louis, to avoid such harassment, particularly to Hodgeville, Kentucky, Salem, Illinois, Coulterville, Illinois, and New Castle, Illinois; and that for the purpose of procuring such settlement defendant's said attorneys and claim agents falsely and fraudulently represented to plaintiff that she had no valid cause of action against the defendant and could recover nothing herein, and made false and slanderous statements as to the character of her attorney, and

That this case was set for trial on the docket of this [fol. 18] Honorable Court for the 8th day of December, 1937, and that the witnesses in behalf of plaintiff were duly subpoenaed to attend the trial of said cause in said Court on said day; that on or about the 23rd day of November, 1937, defendant, for the purpose of intimidating and coercing plaintiff and causing her to enter into a settlement as aforesaid and to execute a release to plaintiff and a stipulation for dismissal of this cause, induced one of the attorneys for the Terminal Railroad Association of St. Louis to call before him one Henry Hamm, the hus-

band of plaintiff's daughter and the father of plaintiff's two small grandchildren, who was an employee of the Terminal Railroad Association, and to threaten said Hamm that he would be discharged from the employment of said Terminal Railroad Association unless plaintiff should accede to the demands of defendant and settle her cause of action as aforesaid; and that said attorney of said Terminal Railroad Association did so call said Hamm before him and by intimidation, coercion and threats of causing such discharge of said Hamm, did cause him to believe that he would lose his position and employment with said Terminal Railroad Association, by reason whereof plaintiff's daughter and grandchildren would suffer and be in want, unless plaintiff should accede to defendant's said demands and make settlement of her cause of action as aforesaid; and that said Terminal Railroad Company, acting in behalf of and as the representative of this defendant and at its request, brought great pressure and undue influence to bear on said Hamm, by reason whereof he agreed to take and, on or about November 30, 1937, did take plaintiff to the office of defendant's attorneys and claim agents in the First National Bank Building in East St. Louis, Illinois, for the purpose of causing plaintiff to sign papers for the settlement and dismissal of her spit pending in this Court; and that, by reason of the threatened discharge of her son-in-law as aforesaid and the fear that [fol. 19] her daughter and the latter's two small children would, by reason thereof, be without means of livelihood and in want, and plaintiff's will being overcome thereby, plaintiff was wrongfully induced, through such coercion and duress, and by reason of the said false and fraudulent statements made to her as aforesaid, to sign and did sign the aforesaid stipulation for the dismissal of her cause and a release of her cause of action, all of which was done in the absence of and without the advice and consent of her counsel. And plaintiff states that by the means aforesaid she was wrongfully induced to release her claim in the sum of Sixty-five Thousand Dollars, (\$65,000.00) for the wrongful death of her husband, under the Federal Employers' Liability Act and the Safety Appliance Act, for said sum of Five Thousand Dollars (\$5,000.00), which, under the facts pertaining to the death of her husband, and under the Federal Law, was and is wholly inadequate and

represents only the earnings of her husband for about a period of two years.

And Plaintiff states that, in addition to the pecuniary loss suffered by her by reason of her husband's death, plaintiff is entitled to substantial damage, under the Federal Employers' Liability Act, for the conscious and excruciating pain her husband suffered between the time of his injury and his death, to-wit: three days; and that such pecuniary loss and the damages recoverable on account of said conscious pain and suffering, under the Federal Statutes and the decisions of the Federal Courts, entitle plaintiff to damages greatly in excess of the sum of Five Thousand (\$5,000.00) Dollars.

And plaintiff further states that a draft was given her and her son-in-law by defendant's agent and attorneys in the sum of Five Thousand Dollars (\$5,000.00), which was drawn on the treasurer of the Southern Railroad Company at Washington, D. C., that said draft was placed by plaintiff in the Southern Illinois Trust Company Bank at East [fol. 20] St. Louis, Illinois, for collection, and was not collected by said Bank until the 6th day of December, 1937; and that as soon as the bank would permit the withdrawal of said Five Thousand Dollars (\$5,000.00) plaintiff withdraw the same and, on December 7, 1937, duly tendered back to defendant said sum of Five Thousand Dollars, (\$5,000.00) together with interest thereon in lawful money of the United States, which tender defendant refused.

Wherefore, plaintiff prays that the Judgment of the Probate Court of St. Clair County, Illinois, referred to in defendant's amended answer be declared null, void and of no effect and that the same was procured by fraud and duress; and that the order of the Judge of said Probate Court which said order is referred to in said defendant's amended answer be declared null, void and of no effect and as being and constituting a part of the result of the fraud and duress [practised] upon the plaintiff; and that the release and contract of settlement referred to in defendant's amended answer be declared null, void and of no effect; and that the plaintiff have her full and complete remedy

at law for the damages she has suffered as in her petition alleged and set forth.

B. SHAD BENNETT, CHARLES P. NOELL, Attorneys for Plaintiff.

[fol. 21] (Praecipe For Issuance of Subpoena for Henry Hamm.)

Issued.

United States of America,

Eastern Division of the Eastern

Judicial District of Missouri.—ss.:

In the District Court of the United States in and for said District.

Mary Stewart, Admx., Plaintiff,

So. Ry. Co., a corp., Defendant.

You will please issue Subpoena, returnable on the 31st day of May, A. D. 1939, for Henry Hamm, East St. Louis, Ill.

Witness on behalf of the plaintiff in the above-entitled case.

CHAS. P. NOELL, Att for Plaintiff.

Clerk of said Court.

Endorsed: "Filed May 26, 1939, Jas. J. O'Connor, Clerk".

[fol. 23] (Motion of Defendant to Strike Out Reply Overruled; Motion of Defendant for Continuance Withdrawn; Jury Empaneled; Trial, June 8, 1939.)

Before Judge Moore-Court No. 2.

June 8, 1939.

Now come the parties by their respective attorneys, whereupon motion of defendant heretofore refiled herein

to strike out plaintiff's reply to defendant's second amended answer, is submitted to the Court, and the Court having duly considered said motion doth order that same be and is hereby overruled. And now the defendant by leave of Court withraws its motion heretofore filed for continuance on trial of this cause.

Whereupon both sides announcing ready, and it appearing that there are an insufficient number of jurors from which to empanel a jury, the United States Marshal is directed to summon eight persons to serve as talesmen herein.

And now pursuant to said order the said Marshal summons the following named persons as talesmen herein:

John J. Connors W. C. Grafton A. O. Grimes Charles H. Buettner Zeno B. Clardy Timothy Quinlan Charles Carroll Julius Huber

And now there comes also the following jury, to-wit:

Benjamin C. Comfort Thomas J. O'Brien G. M. Alexander Chas. Hebbeler Wm. G. Bigalte L. J. Braning

Kenneth A. Aderholt Fred A. Gerber Roy Moore Oscar E. Broyer Burr T. Crawford C. A. Chase

twelve (12) good and lawful men who having been duly drawn, [summond] and chosen, are now sworn to well and truly try the issues herein joined, and a true verdict render according to the law and evidence.

Whereupon introduction of evidence in chief on behalf of plaintiff is commenced but not concluded, and further proceedings on the trial of this cause are postponed until tomorrow at 11:00 o'clock A. M.

(Trial, June 9, 1939; Motion of Defendant for Directed Verdict Overruled.)

Before Judge Moore-Court No. 2.

June 9, 1939.

Now again come the parties by their respective attorneys, and comes also the jury heretofore empaneled and

sworn; whereupon introduction of evidence in chief on behalf of plaintiff is resumed and concluded, and motion of defendant for a directed verdict in its favor at the close of plaintiff's case in chief is filed, and submitted to the Court and by the Court after due consideration thereof is overruled.

Whereupon introduction of evidence on behalf of defendant is commenced and concluded, and introduction of evidence in rebuttal on behalf of plaintiff is commenced but not concluded, and further proceedings on trial of this cause are postponed until tomorrow at Ten o'clock A. M.

[fol. 24]

(Trial, June 10, 1939.)

Before Judge Moore—Court No. 2.

June 10, 1939.

Now again come the parties by their respective attorneys and comes also the jury heretofore empaneled and sworn as on yesterday; whereupon introduction of evidence in rebuttal on behalf of plaintiff is resumed but not concluded, and further proceedings on the trial of this cause are postponed until Monday next at ten o'clock A. M.

(Trial, June 12, 1939.)

Before Judge Moore-Court No. 2.

June 12, 1939.

Now again come the parties by their respective attorneys, and comes also the jury heretofore empaneled and sworn as on yesterday; whereupon introduction of evidence in rebuttal on behalf of plaintiff is resumed and concluded, and introduction of evidence in sur-rebuttal on behalf of defendant is commenced and concluded, whereupon the hour of adjournment having arrived, it is ordered that further proceedings on the trial of this cause be postponed until tomorrow at ten o'clock A. M.

(Trial, June 13, 1939; Motion of Defendant for Directed Verdict Overruled; Verdict and Judgment.)

Before Judge Moore-Court No. 2.

June 13, 1939.

Now again come the parties by their respective attorneys, and comes also the jury heretofore empaneled and sworn as on yesterday; whereupon trial of cause is resumed. And now motion of defendant for a directed verdict in its favor at the close of all the evidence is filed, and submitted to the Court, and by the Court, overruled.

Whereupon the jury after hearing arguments of counsel for the respective parties, and being duly charged by the Court, retires to consider of its verdict, which verdict it afterwards returns into Court finding the issues herein joined in favor of plaintiff and against defendant, in the sum of Seventeen Thousand Five Hundred Dollars (\$17,500.00), and assess the damages of said plaintiff against said defendant, which verdict is in words and figures, to-wit:

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff,

VB.

Southern Railway Company, a corporation, Defendant.

Verdict:

We, the jury in the above entitled cause find the issues herein joined in favor of the plaintiff, Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased [fol. 25] and against the defendant, Southern Railway Company, and assess the damages of said plaintiff against said defendant in the sum of Seventeen Thousand Five Hundred Dollars (\$17,500.00).

C. F. HEBBELER,

Foreman.

June 13, 1939.

Which verdict is by the Court ordered filed and is filed.

It [—] therefore pursuant to the finding and verdict of the jury as aforesaid, Ordered and Adjudged that plaintiff, Mary Stewart, Administratrix of the Estate of John B. Stewart, deceased, have and recover of the defendant, Southern Railway Company, a corporation, the sum of Seventeen Thousand Five Hundred Dollars (\$17,500.00), as her damages herein assessed, against said defendant, together with her costs and charges herein expended, for all of which judgment, costs and charges let execution issue upon praecipe filed therefor by said plaintiff.

[fol. 26] (Order Staying Execution of Judgment Pending Motion to Set Aside Verdict and Judgment.)

(Filed June 22, 1939.)

It is hereby ordered that defendant's motion to stay execution of the judgment herein shall be and is sustained, and the execution of the judgment in this cause shall be stayed until defendant's motions to set aside the verdict and judgment entered thereon and to have judgment entered in accordance with its motion for a directed verdict, or in the alternative to be granted a new trial shall have been passed upon by this Court.

It is further ordered that in case either or both of said motions shall be overruled, then the execution of the judgment herein shall be stayed until the expiration of ten days after the Court [—] on defendants' alternative motion.

GEO. H. MOORE, Judge, United States District Court.

[fol. 27] (Order Amending Order Staying Execution of Judgment Pending Motion to Set Aside Verdict and Judgment.)

(Filed June 24, 1939.)

It is hereby ordered that the order of this Court entered herein on Thursday, June 22, 1939, be so amended as to grant defendant a stay of execution on judgment in the above captioned matter until the expiration of thirty days instead of ten days after the ruling of this Court on defendant's motion for judgment notwithstanding the jury's verdict, or for a new trial, in the event said motion should be ruled upon adversely to the defendant by this

Court. In all other respects the aforesaid order to stand as originally drawn.

GEO. H. MOORE,

Judge.

[fol. 28] Motion of Defendant for Judgment Notwithstanding Verdict or for New Trial.)

(Filed June 22, 1939.)

Comes now the defendant and moves the court to set aside the verdict herein and any judgment which has been rendered pursuant thereto, and notwithstanding said verdict, to have judgment entered for defendant in accordance with its motion for a directed verdict filed herein and presented to this court at the close of all the evidence in this case, upon each and every ground set forth in its said motion for a directed verdict.

Defendant further prays in the alternative for a new trial if the court should refuse to set aside the yerdict and judgment herein and to enter judgment in accordance with its motion for a directed verdict as last above prayed. As grounds for said new trial defendant states:

I.

The verdict of the jury herein is not supported by any competent and legal evidence.

H.

The release executed by the plaintiff is binding upon her and there is no evidence showing that any fraud or duress entered into the execution thereof.

[fol. 29] III.

The record and proceedings of the Probate Court of St. Clair County, Illinois, introduced in evidence, which disclose that plaintiff made application to such Court for authority to execute the aforesaid release and received authority so to do, together with the order of said Court retaining jurisdiction over the matter constituted a final judgment unappealed from and which cannot be collaterally attacked in the trial of this case. The judgment and action of the Probate Court are binding upon plaintiff where-

by she had and has no authority or right to attack in this action the release pleaded in bar hereof.

IV.

The court erred in admitting incompetent, irrelevant, improper and prejudicial evidence offered by plaintiff and objected to by defendant.

V.

The court erred in refusing to admit competent, relevant and material evidence offered by defendant.

VI.

The verdict by the jury is excessive and so excessive as to indicate that it resulted from passion and prejudice on the part of the jury against defendant.

VII.

The verdict of the jury is so indefinite as to be a nullity; for the reason that it cannot be determined whether the intention of the jury was to render a verdict in favor of plaintiff for the sum of \$17,500.00 less the sum of \$5000.00 which plaintiff had already received from defendant; or [fol. 30] whether the verdict was to be in the sum of \$17,500.00, exclusive of the \$5,000.00 payment which had already been made by defendant to plaintiff.

VIII.

The Court's charge to the jury is erroneous in each and every particular pointed out by defendant and included in defendant's objections and exceptions to the charge, made at the close of its delivery by the court and before the jury retired to consider its verdict. Each objection and exception to said charge is separately assigned as error.

IX.

The court erred in failing and refusing to give to the jury each and all of the instructions on the merits, requested by defendant at the close of all the evidence marked Instructions. A to U, both inclusive; for the reasons assigned by defendant to the Court's refusal to give said instructions, immediately subsequent to the court's charge to the jury herein. The refusal of each of said instructions is separately assigned as error.

The court erred in overruling and denying defendant's motion for a directed verdict offered at the close of and of its evidence in the case.

XI.

There is no substantial evidence in this case proving or tending to prove that the defendant was guilty of a violation of the Safety Appliance Statute of the United States [fol. 31] as alleged in the petition.

WILBER LUCAS,
WALTER N. DAVIS,
ARNOT L. SHEPPARD,
Attorneys for Defendant.

[fol. 32] Docket Entry Showing Submission of Defendant's Motion for a New Trial, Etc.

> Before Judge Moore—Court No. 1. (July 18, 1939.)

By agreement motion of defendant for judgment notwithstanding the jury's verdict or for a new trial submitted.

[fol. 33] (Order Denying Motion of Defendant for Judgment Notwithstanding Verdict or for New Trial.)

(Filed August 24, 1939.)

United States District Court in and for The Eastern Judicial District of Missouri, Eastern Division.

Mary Stewart, Admx. etc., Plaintiff, No. 12154. vs.

Southern Railway Company, Defendant.

Now the Court having duly considered the motion of defendant for a new trial and for judgment non obstante, and being fully advised in the premises,

Doth Order that such motion be and is hereby overruled.

GEO. H. MOORE, U. S. District Judge.

Angust 22nd, 1939:

[fol. 34] Docket Entry Showing the Fixing of Amount of Supersedeas Bond and to Filing Transcript of Evidence and Proceedings.

Before Judge Moore-Court No. 1.

September 18, 1939.

Application of defendant for fixing of supersedeas bond on appeal by defendant, herein to U. S. C. C. A., Eighth Circuit, from judgment heretofore entered filed, submitted and granted, and supersedeas bond of defendant on proposed appeal fixed in the sum of \$25,000.00 to be approved by the Court. Transcript of evidence and proceedings on trial of cause filed in duplicate by defendant.

[fol. 40] Transcript of Evidence and Proceedings.

(Filed Sept. 18, 1939.)

District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff, No. 12154. vs. Court No. 2.

Southern Railway Company, a corporation, Defendant.

Be It Remembered: That upon the the trial of this cause during the March Term, A. D. 1939, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, beginning on June 8, 1939, before Honorable George H. Moore, District Judge, and a jury, the following proceedings were had:

Appearances:

For Plaintiff, Mr. Charles P. Noell and Mr. Charles M. Hay.

For Defendant, Mr. Walter N. Davis, Mr. Arnot L. Sheppard, and Mr. Wilder Lucas.

A jury was duly impaneled and sworn.

Mr. Noell, on behalf of plaintiff, made his opening statement to the Court and the jury.

Mr. Davis: The defendant will reserve its statement, Your Honor.

[fol. 41] The plaintiff, to support the issues on her behalf, offered and introduced the following evidence:

Louis A. Stogner, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Please state your name. A. Louis A. Stogner.

Where do you live, Mr. Stogner?

Two miles east of Collinsville, Illinois. How old are you? A. Forty-seven.

Q. Where do you work?

- A. The Southern Railway, East St. Louis.
- Q. How long have you been with that company?

A. Since September 17, 1920.

Q. What is your employment with that company?

A. Switchman.

Do you recall the 12th day of February, 1937, were you working as a switchman for that company?

A. How is that?

Q. Do you recall on the 12th of February, 1937?

The 12th, yes, sir.

What yard were you working in? A. The Kotman yard.

What company?

The Kotman yard, Southern Railway

[fol. 42] Q. What is the name or what was the name of your engineer? A. Martin.

Q. What is his first name?

A. I will be darned if I know.

Q. What was the name of your fireman?

A. Wavy Lile.

What was the name of the rest of your crew?

Mr. Russell and Johnson.

What was his occupation, Mr. Russell? He was following the engine, switchman. Q. And who else?

+. J.

A. Mr. Stewart, John Stewart.

Q. John R. Stewart; what time did you go to work for that, did you go to work that day? A. 3:00 P. M.

Q. What time was your quitting time?

A. 11:00 P. M.

Q. What kind of a day was it?

A. When the accident occurred?

Q. Yes, sir. A. About 5:40.

Q. And what kind of a day was it?

A. About 5:40 P. M.

Q. About 5:40; but what kind, that is a bright day or a dry day? A. Well, about dusk I would call it.

Q. Was it a dry day? K. Dry day?

Q. Yes. A. It was dry, yes, sir.

Q. It was dry. What track were you working on at the [fol. 43] time of the accident? A. Track No. 12.

Q. How many cars did you have on that track?

A. Well, probably eighteen or twenty.

Q. What were you doing with those cars?

A. Coupling them up.

Q. By coupling them up, what do you mean?

A. Getting the cars together so we could pull them out of the track.

Q. Where were you going to take them to?

- A. Why, we were going to switch them, put them where they belonged, take part of them to what we call the junction.
- Q. How many cars were attached to the engine when the accident occurred? A. About seven or eight.

Q. Which way was your engine headed? A. West.

- Q. Which way were you moving in order to couple those cars? A. Well, you go ahead and back up.
- Q. In other words, as you couple the cars the engine would be moved a short space westwardly, is that it?

A. Yes, sir, you have to make an opening.

Q. What kind of track was this where it occurred, straight or curved? A. Straight track.

Q. It couples—do couplers couple automatically on straight track better than they do on a curve?

[fol. 44] Mr. Davis: That is immaterial.

Q. In your experience.

Mr. Davis: That is immaterial, may it please the Court.

The Court: How is that relevant, Mr. Noel?

Mr. Noell: Well, it shows the cars were not coupled automatically, but if he objects I will withdraw the question.

Q. You say it was a straight track though?

A. Yes, sir.

Q. What were you doing at the time this accident occurred?

A. Taking check of the cars, that is, getting a list of where they go.

Q. How close were you to Mr. Stewart when he got

hurt?

- A. Well, I was probably about eighty or ninety feet east of him.
- Q. You were probably about eighty or ninety feet east of him, in other words, you were between the engineer and Stewart?

A. No, sir, the opposite, the engineer was west of Mr. Stewart.

Q. The engineer was west of Mr. Stewart?

A. Yes, sir.

Q. Well, then was Mr. Stewart east of you?

A. No, he was west of me. I was east of Mr. Stewart and then Mr. Stewart and then the engineer was west of [fol. 45] Mr. Stewart.

Q. The engine was headed west? A. Yes.

Q. Where were these cars at on the west or east?

A. East of the engine.

Q. They were east of the engine? A. Yes, sir.

Q. Then in coupling these cars, would you come ahead or would you back up?

A. By coupling up we would back up, we would go east.

Q. I see. The engine was headed west, and you were going to take and couple these cars on that track, you would have to move, you would have to back them up?

A. Yes.

Q. In other words, the tender of that engine was close to the car? A. Yes, sir.

Q. And the locomotive attached to the engine tender was farthest away from the cars you were coupling?

A. That is right.

Q. Now, then, what side of this train did your men work, the engineer or fireman's side?

A. The engineer's side.

Q. That would be on the north side, would it not?

A. Yes, sir.

Q. Now, how many cars were coupled and attached to this engine at the time Mr. Stewart was injured? [fol. 46] A. Well, about seven or eight.

Q. What was the first notice that Mr. Steward had been

injured that you received?

A. I heard him holler.

Q. You heard him holler? A. Yes, sir. Q. What did you? A. I ran to him.

Q. And what position did you find him in when you got to him?

A. I found him in, with his arm caught along about here (indicating) between the draw bars.

Q. You are now indicating between the wrist and the

elbow? A. Yes, sir.

Q. On your right arm? A. Yes, sir.

Q. Is that correct? A. That is right.

Q. And that was his right arm that was caught?

A. Yes, sir.

Q. Were those couplers, those knuckles on the couplers opened or closed when you got there? A. Closed.

Q. Both of them closed? A. Yes, sir.

Q. That is the knuckle on the west end or the east end of the west car, and the knuckle on the west end of the east car, they were both closed?

A. Both knuckles on both cars were closed.

Q. And his arm was caught in between those two knuckles?

[fol. 47] A. Yes, sir.

Q. Now, a knuckle is just the end of a coupler, is it not?

A. That is right.

Q. I will get you to—you might mark this Exhibit "A", Plaintiff's Exhibit "A".

Mr. Davis: I do not see how we can mark this Exhibit "A" and ever get it in the record.

Mr. Noell: Well, we can take it up and show it itself.

(A model coupler was marked by the reporter as Plaintiff's Exhibit "A".)

Q. Explain to the Court and the jury what a knuckle is on a coupler, point out what you mean by a knuckle.

A. This is what I would call the knuckle, this part here,

that is open (indicating).

Q. This part right here (indicating)?

A. Yes, sir.

- Q. That is a knuckle? A. What I call.
- Q. This small thing here is a draw bar?

A. Yes, sir.

- Q. Now, where did you find his arm caught?
- A. Between this and the one on the opposite car.
- Q. And the car that has a draw bar on the opposite side? A. Yes, sir.

[fol. 48] Q. That is where you found it, and you found his arm caught this way between the wrist and the elbow?

A. Somewhere.

Q. Somewhere around that?

Mr. Hay: May I suggest you turn that around so all the jury can see what you mean?

Q. This here is what you call the knuckles?

A. That part that opens, yes, sir.

Q. Now, this here, what do you mean by this, Mr. Stogner, on the outside? A. The pin lifter.

Q. I guess you understand that is not the same knuckle!

A. I understand.

Q. This is American Railway—what is that?

A. A. B. A.

Q. A. R.— A. One or the other.

Q. That stands for American Railroad Association?

A. I think, I guess so.

The Court: What do you call that lower device there?

A. The thing you got hold of is a pin lifter.

Q. That is supposed to throw this open? A. Yes, sir.

The Court: Pin lifter?

[fol. 49] A. Yes, sir.

Mr. Noell: Pin lifter, yes, sir.

Q. Sometimes they are connected, aren't they, Mr. Witness, by a pin coming this way, throws this knuckle open?

A. Yes, sir.

Q. Or sometimes they are underslung, like that?

A. Yes, sir.

Q. But in any event, they all have this pin lifter?

A. Yes, sir.

The Court: Hand that over here. I want to take a look at it.

(Plaintiff's Exhibit "A" handed to the Court, as requested.)

Q. Now, what is the purpose of that pin lifter, Mr. Witness?

A. Why, it is to open the knuckles so they will tie the different cars together so you can pull them ahead or back them up or stop them.

Q. With both knuckles closed, can you couple the cars?

A. No.

Q. With one knuckle open and one closed can you couple cars? A. Yes, sir.

Q. With both knuckles open can you couple cars?

A. Yes, sir.

Q. In other words, you got to have at least one knuckle [fol. 50] open in order to make an automatic coupling?

A. Yes, sir.

Q. Now, that is done by a man on the outside of the

car with a pin lifter? A. Yes, sir.

Q. Now, then, I wish you would demonstrate just how that couple is used where a man stands on the outside, just to show the Court and jury how that is done; just take the coupler—you can stand up there, please lift it up there. It has a broader surface to set on. You might fall over there.

A. Well, anyway-

The Court: Put it over here.

A. Well, you would walk up to the car and reach down and get the lever and jerk the lifter and it kicks open.

Q. Now, have you had any experience with the pin lifter not opening up automatically? A. Yes, sir.

Mr. Davis: Now, we object to that, Your Honor. It is not a question of what experience he had, but a question of what happened in this case.

Mr. Noell: Well, what we are getting at is, we have pleaded it did not work automatically, and it was necessary for the deceased to go in and open up with his hand, and [fol. 51] and that is where his hand was found afterward caught.

We expect to show by this witness that when it don't work automatically, just what they do to open this knuckle; that is the purpose of this inquiry, which has a bearing on the case because the deceased was found in that position, and we want to explain why he went in between.

The Court: It is supposed to open automatically?

Mr. Noell: Yes, automatically.

They are supposed to open automatically, if they do not open—I seem to be testifying.

We expect to show it, how this thing opens, how he goes in there and opens it with his hand. It is certainly pertinent.

The Court: Read the question.

(Question read.)

Mr. Davis: This was on other occasions:

Mr. Noell: He has had considerable experience.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

The Court: Let me caution the witness, in the future do not answer a question when you see counsel about to [fol. 52] object until they have had the opportunity to make an objection and the Court has passed on the objection.

The Witness: All right, sir.

Q. Now, you can answer whether you had experience.

(Previous answer read.)

Q. Just state what that experience is, what is done when you are unable to get it open with the pin lifter, as Exhibit "A".

A. If you do not open by pin lifter, you jerk it a time or two, you go and pull this apart, open that car.

Q. And by reaching in you put your body in between

the cars? A. Yes, sir.

Q. And you go two or three feet between the rails.

A. You have to step over the rails.

Mr. Davis: We object.

The Court: Wait a minute.

Mr. Davis: I do not like to keep on making these objections, but this is all suppose. And what is done in other instances is not a question of what was done in this instance.

The Court: It is a question of what was done in this instance.

It may be necessary to lay a foundation.

[fol. 53] Mr. Davis: Well, all right. I do not mean to object, to make frivolous objections.

The Court: I know, you may object any time you wish, Judge. No doubt you will.

Mr. Hay: And sometimes when he should not.

Q. Just demonstrate to the jury how that coupling was opened, with this closed like this, and you can't get it open from the outside of the car, before you step in, I mean after you step in between, how do you go about getting that knuckle open?

A. You give it a jerk with this lifter.

Q. With what hand?

A. Usually with the left hand, step over the rails, and then open it with your hand, like that (indicating).

Q. And you are facing in the car at the same time?

A. Yes, sir.

Q. What is the purpose of using the left hand on the pin lifter and the other hand on the, what is the, what is it, the knuckle, what is the purpose?

A. You have to face the car to do your work.

Q. Can you frequently get it open by doing that by using both hands, one on the pin lifter and one on the knuckle? A. Yes.

Q. Does it give you some kind of leverage?

[fol. 54] A. It will give you leverage, it holds the weight of the knuckle off the knuckle.

Q. That is your left hand will? A. Yes, sir.

Q. Your left hand, what is the purpose?

A. Well, to open this knuckle.

Q. How heavy are those things that swing out, pretty heavy?

A. Why yes, they weigh probably forty pounds, in that

neighborhood.

Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident? A. I did.

Q. How did you open the knuckle?

A. I opened it with my hand.

Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?

A. No, sir.

Q. Mr. Stogner, did Mr. Stewart have any other duty there at the time other than to couple these cars?

Mr. Davis: If he knows.

Mr. Noell: Certainly, if he knows.

The Court: Yes. If he does not know he should not tell it.

[fol. 55] A. None that I know of.

Q. I see. In other words, his duty at that time was to couple these cars? A. Yes, sir.

Mr. Davis: Now, we object to that. That is leading the witness.

The Court: Sustained.

Mr. Noell: All right.

Q. Just what duty did he have?

A. Well, I told him to couple up the cars, and I would get a check of them and give him a copy of the check.

Q. Do you know whether he had any duty other than to couple the cars at the time he was hurt?

A. None that I know of.

Q. And I have reference particularly, that is nothing other than the getting this knuckle open would require him in his work there to go in between the ends of the cars?

Mr. Davis: Now, we object. We think that is a surmise and conjecture.

Mr. Noell: No, that is not surmise. We are trying to prove his duty.

The Court: The objection is sustained as to the form of your question.

Mr. Noell: How is that?

The Court: The objection is sustained as to the form.

[fol. 56] Mr. Noell: Yes, as to the form of the question.

Q. Can you mention anything that would have required him under his duties there of coupling the cars to go between the end of the cars, do you know of any duty he had other than to couple the cars?

Mr. Davis: Wait a second. Well, that is all right. I have not any objection to that.

The Court: All right. You may answer.

A. I do not know anything other than make a coupling.

Mr. Noell: All right. You may cross-examine.

Cross-Examination.

By Mr. Davis:

Q. What two cars was he between, Mr. Stogner, what two cars was he between?

A. I think he was between about the seventh and eighth car, if I remember right.

Q. Do you remember what the cars were?

A. One of them was a Big Four empty and I think the other one was a Michigan Central.

Q. Michigan Central car?

A. I am not positive about that.

Q. Now, whatever two cars they were, did they have automatic couplers on them? A. Yes, sir.

[fol. 57] Q. That is couplers that would automatically,

couple automatically by impact? A. Yes, sir.

Q. Now, if the couplers or knuckles on the car are closed, and they are so close together, then you can't open them with a pin lifter, can you? A. No, sir.

Q. And when had you been by there before?

A. Why, just-

Q. That is by—where these two cars or where Stewart was found? A. Oh, two or three minutes.

Q. Two or three minutes? A. Yes, sir.

- Q. And what position were the couplers in at that time?
- A. Well, there was two or three cars along there with the knuckles closed, and they were all locked together.
 - Q. All locked together?

A. Yes, sir.

Q. Now, which knuckle on which car did you open, or the knuckle on which car did you open?

A. On the Michigan Central car it was.

Q. On the Michigan Central? A. Yes, sir.

Q. And you say these cars, I think you told Mr. Noell that they were headed east and west?

A. The cars were west of the engine, is that what you mean!

Q. Yes. I know, but the cars were on a track that was [fol. 58] an east and west track? A. Yes, sir.

Q. And which side were you working on?

A. The north side.

Q. The north side? A. Yes, sir.

Q. Now, which knuckle did you try to open, or which pin lifter did you try to use?

A. The one on the north side.

Q. On the north side? A. Yes, sir.

Q. And which car was that?

A. Well, that was the east car on the opening.

Q. The east car? A. Yes, sir.

Q. And the pin lifter on the other car was there also, was it? A. Yes, sir.

Q. And did you try to open the knuckle with the pin lifter on the other car? A. No. sir.

Mr. Davis: I think that is all, Mr. Noel.

Redirect Examination.

By Mr. Noell:

Q. The pin lifter on the left side, there is only one pin lifter on the north side between those two cars, wasn't there? A. That is all.

Q. In other words, the pin lifter is on the left side of the car as you face the end of it? A. That is right. [fol. 59] Q. If you turn around and face the side of the car, a pin lifter is on the end or right side of every car as you face it, no matter where it is in the United States, is that correct? A. If you are facing the engine.

Q. Facing the side of a car, facing the car?

A. The pin lifter on the right.

Q. On this next car tell us where the coupler is, but facing the side of the car, then the pin lifter comes out on the outside of that car, on the right side of that car?

A. That is right.

Q. But if you face the end of the car, then the pin lifter is always on the left? A. That is right.

The Court: That may be very plain to the jury.

The Witness: Yes, sir.

The Court: I am a little confused myself.

Mr. Noell: Well, we will take any kind of car.

Q. Take a box car. This is east and west. Now, of course, a box car as I understand it, both ends have couplers? A. Yes, sir.

Q. We will say here at the east end of that car there is a coupler draw bar. Now, as you face that draw bar, that pin lifter will always be right here, will it not? [fol. 60] A. That is right.

Q. If you turn around and face the side of the car?

The Court: What does that mean in the record "right here"?

Q. Oh, yes. The pin lifter will be on the left-hand of that car, and to the left of the draw bar? A. Yes, sir.

Q. If the car is facing east and west that would be the south side of the draw bar?

The Court: The pin lifter on which side?

Mr. Noell: The south side of the draw bar.

The Court: I mean the right or the left, not the south.

Mr. Noell: The left side of the draw bar as you face the draw bar, but if you face the side of the car, no matter where you face it, the pin lifter will always be on the right and the end of the car, is that correct?

The Witness: That is right.

Q. Now, then, there is not a pin lifter on each end of the car, just on diagonal ends, is that correct?

A. Opposite ends, yes, sir.

Q. Opposite ends. In other words, the-

The Court: How many ends do they have on these cars!

Mr. Noell: Two ends, the east end and the west end, [fol. 61] in this case—

Mr. Sheppard: He means the diagonal corner.

The Court: I want to get that straight.

Mr. Sheppard: He means the diagonal corner.

The Court: I want to get that straight, and I did not know what a diagonal end was.

Q. Let me ask you this, would there be a pin lifter over on this side of the car if there was another car?

The Court: Which side do you mean?

Mr. Noell: That is on the left side of the car if it was facing there.

Q. Where would the pin lifter be on the other car?

A. You mean the car in front of this?

Q. Yes, sir.

A. It would be right opposite, be the same position as this would be if it was turned over (indicating).

Q. Now, suppose that is the west end, the east end of the west car, and Mr. Stewart was going to couple, suppose the west end of the next car.

The Court: Don't you think it would be better for you to stand away from the witness, Mr. Noel?

Mr. Noell: Yes.

Q. Suppose the west end of the east car, facing that car, where would the pin lifter be on that car? [fol. 62] A. On this, over here (indicating).

Q. Over there. Which side is that, the north or south

side?

A. That would be the south side from the track he was working on.

Q. Well, you were working on one side of the track?

A. The north side.

Q. The north side. And where was the pin lifter at, what side was it on?

A. The one we used would be on the north side.

Q. On the north side. And assuming that there would be the end of the west car, then it would be on the northwest corner that the pin lifter was that is involved in this case? A. Yes, sir.

Mr. Noell: That is all.

Recross Examination.

By Mr. Davis:

Q. One question more.

Mr. Hay: Well, before you go into that, may I just say if I understand, I think Your Honor and I are working mentally about the same way on this thing. May I ask the witness a question?

The Court: All right.

Redirect Examination.

By Mr. Hay:

[fol. 63] Q. Let's assume that this table here is a car, and that this end at which I am standing is the west end, and that is the east end over there. This would be the north side over here (indicating), wouldn't it?

A. Yes, sir.

Q. And that side the south side? A. Yes, sir.

Q. Now, the pin lifter in this instance would be over here at this corner where I am standing, wouldn't it?

A. Yes, sir.

Q. On that side; and the man who was to make the coupling would stand outside on the north side, work this pin, the lever, which would cause the knuckle to open?

A. Yes, sir.

Q. And he would not have to go inside if it worked, that is right, isn't it? A. That is right,

Q. And the only thing that would require him to get

in there would be that it did not work?

A. The only thing I know of, yes, sir.

Q. Now then the pin lifter at the other end of this particular car would be over at the corner where Mr. Davis is sitting, wouldn't it (indicating)? A. Yes, sir.

Q. So that Mr. Noell is right when he says that when you face the end of a car the pin lifter is always to your

[fol. 64] left, that is right, isn't it? A. Yes, sir.

Q. If you stand west of it and look east, then it is to the left, or vice versa if you get over to the other, is that right? A. That is right.

Mr. Hay: Have we got it cleared up, does that clear it up?

The Court: Yes, I think even the Court understands it now.

Mr. Davis: Are you through, Mr. Hay?

Mr. Hay: Yes.

Mr. Davis: You go ahead and examine him.

By Mr. Noell:

Q. What did you do with the cars that you had there on the track?

A. Well, we switched them and then backed some of them down to General Roofing, and the glass house, and to a place we call the junction.

Q. Was there some of them loaded and some of them

empty? A. Yes, sir.

Q. Do you remember any particular place that you

took any particular cars that night?

A. These cars, some of them went into the Industries down there, I just mentioned, and some of them were held over until they were ordered into the Industry.

Q. Do you remember with reference to the interstate [fol. 65] movement of these cars where some of them had

come from and where they were going to?

A. Well, we had no record of that switching in the yard, all we had was the address on the cars, where they go to.

Q. What did you have there with reference to that? A. Well, there is a little card put on the side of the car, if it is going-

Mr. Davis: We object to that. The eards are the best evidence.

Mr. Noell: Well, we will withdraw this witness temporarily.

By Mr. Noell:

Q. It was track 17 or track 12, I understand, that you were coupling up all these cars? A. Yes, sir.

Q. And you were going to couple all these cars up and take them out of there, I believe, and deliver them?

A. Yes, sir.

To the various industries and places they belonged to, is that correct?

A. Switch them and back them, yes, sir.

You had seven or eight coupled already, and how many more were you to couple on this track before you moved off that track?

A. I could not say how many couplings I made, made

several.

[fol. 66] Q. And what time did the accident occur, about 5:40 did you say? A. About 5:40.

Q. On February 12th? A. Yes, sir.

Now, then after the accident did you go with Mr. Stewart to the hospital?

A. No, sir. We took him to, up to Broadway and put

him in the ambulance.

Q. And how long was it between 5:40 when he injured, and the ambulance arrived, approximately?

A. Oh, probably fifteen minutes.

And then where was he taken at, from there?

To St. Mary's Hospital.

To St. Mary's Hospital? A. Yes, sir.

Who went with him?

A. Why, some fellow by the name of Hamletts.

Now, during that time was he walking was Mr. Stewart walking?

A. Why, we put him on the foot board of the engine, and took him up to Broadway, as close as we could get, and helped him over from the track over to Broadway.

Q. Was he conscious during that time? A. Yes, sir.

Q. Was he suffering with his arm at that time after the accident? A. Apparently quite a bit. [fol. 67] Q. How could you tell?

A. Why, he was groaning and moaning.

Q. And then did you see him any more after he was put on the ambulance? A. Not that day.

Q. No. Did you see him the following day?

A. Yes, sir.

Q. Where at? A. At the hospital. Q. What condition was he in then?

A. Why, he was normal, seemed to be a little low-spirited, looked at his arm, but otherwise he looked all right.

Q. Did you say a little spirited or low spirited?

A. Low spirited.

Q. Was he suffering at that time with his arm?

A. Why, he did not seem to be suffering so much in the couple minutes I was with him, he cried a little bit from losing his arm.

Q. How is that?

A. He cried a little bit about losing his arm. I told him about several fellows we knew lost their arm or leg, and tried to jolly him up some and get away as quick as-I could.

Q. That was the following day after he got hurt, you

paid him a visit? A. Yes, sir.

Q. What was his condition before he was injured, was he normal in every respect?

[fol. 68] A. As far as I know.

Q. You had worked with him all day, of course?

A. Yes, sir.

Mr. Noell: I believe that is all.

Recross Examination.

By Mr. Davis:

Q. Now, before the accident when had you last seen Mr. Stewart?

A. Well, three or four or five minutes before.

Q. Three or four or five minutes before, and you had not seen him just before he, you heard him holler?

A. No, sir.

Q. And you did not see him attempt to lift the pin lifter, did you? A. No, sir.

Q. On either one of those cars? A. I did not.

Q. That he was found between? A. No, sir.

Q. Now, was he injured any other place than his arm?

A. Not that I know of, I'didn't examine it.

Q. He did not complain of any other place, did he,

except an injury to his arm? A. That is all.

Q. Now, the pin lifter on the north car, on the west car was on the south side, wasn't it? A. Yes, sir. [fol. 69] Q. And the pin lifter on the east car was on the north side of the car?

A. I did not quite get your question.

Q. I say, the pin lifter on the east car was on the north

side of the car? A. Yes, sir.

Q. That is, I am speaking of the two cars between which he was caught, and which you found him, that is the car in there, the pin lifter on the west car was on the south side of the car? A. Yes, sir.

Q. And the pin lifter on the east car was on the north

side of the car? A. Yes, sir.

Q. And he was working on the north side of the car?

A. Yes, sir.

Q. And you did not see him at all attempt to lift these pin lifters? A. No, sir.

Redirect Examination.

By Mr. Noell:

Q. Do you know whether he tried to lift the pin lifters or not? A. I do not.

Q. Why?

A. Well, I was west or east of Mr. Stewart.

Q. You were west of him, or east of him, and were you paying any attention or not before he got hurt? [fol. 70] A. I was not watching Mr. Stewart, if that is what you mean.

Q. I see. That is all.

Mr. Davis: That is all, may it please the Court.

The Court: Very well.

HENRY MARTIN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Q. Will you please state your name?

A. Henry Martin.

Q. Where do you live, Mr. Martin?
A. 3514 Bond Avenue, East St. Louis.

Q. Were you the engineer in the crew at the time John R. Stewart was injured February 12, 1937? A. Yes.

Q. You were on track 12, I believe. A. Yes, sir.

Q. Coupling up the cars. Your position was on the engine? A. Yes.

Q. And your fireman was Mr. Liles, was it?

A. Mr. Lile.

Q. And which side of the train was Mr. Stewart working on? A. On the north side.

Q. How far away from you, when he got hurt?

[fol. 71] A. Well, to the best of my judgment, six or seven car lengths.

Q. Six or seven car lengths. Now, an average car length is about how many feet, what would you say?

A. Well, I guess they vary in their length.

Q. What would you say they would be, approximately how many feet?

A. I would not say how long the cars were.

Q. What do they generally average, a railroad car?

A. I do not know much about that part of it.

Mr. Davis: Do you want to state the length of a car?

Mr. Noell: About forty feet.

Mr. Davis: I think we can agree on that, the average car length of a car is about forty feet.

Mr. Noell: Yes.

Q. A switchman would know that more than an engineer? A. Yes.

Q. Now, Mr. Martin, what was Mr. Stewart doing?

A. He was coupling up cars.

Q. Coupling up the cars. Now, just what would he do

when he would couple up a car?.

A Well, we couple on to the engine, and went back down on Number 12, then he would walk down a little ways, give me another back up signal, give me a stop signal; then he coupled on again, and he walked back and give [fol. 72] me a back-up signal, then he give me a stop signal, and he went in between the cars.

Q. He did. What was the purpose of giving you that stop signal just before he went in between the cars?

Mr. Davis: May it please the Court. We object to what his purpose was. He can't know his purpose.

Mr. Noell: All right. I will withdraw that.

Mr. Davis: He gave him a stop signal, he said.

Q. He did give you a stop sign, and then you saw him go in between the cars and disappear?

A. He went in between the cars.

Q. He went in between the cars; and then how many minutes of time elapsed there before the accident happened, after he went in between the cars?

A. I do not know that. I could not say.

Q. Just approximately?

A. After he went in there I heard him holler.

Q. Yes.

A. I told my fireman, I told him to run back and see what the trouble was.

Q. Had you moved your engine? A. No, sir.

Q. Do you know what caught him?

A. I had her in back motion and the brake set all the time.

Q. Your engine was stationary. Did you hear any noise of any other engines?

A. No noise, no, sir.

[fol. 73] Q. Well, do you know what caught his arm in there?

A. No.

Q. You do not know; did you ever get down off the

engine to look at where he got hurt?

A. Yes, sir, after the fellow come and give me a slack ahead signal, when I stopped I went back to see what the trouble was. I said, "What is the matter". He said, "He got his arm hurt". I said, "Run down and see Mr. Freese on the lead and tell him to send for the ambulance right away".

Q. Do you know why he slacked you ahead?

A. No, I do note I do not. I just go by signal.

Q. I know, you just go by signal. He gave you a signal to move which direction, westwardly?

A. West.

Q. By moving westwardly would that release his arm between the couplers?

A. (No response.)

Q. I say, by moving westwardly, moving your engine westwardly, would that release Stewart's arm between the closed coupler?

A. Well, I don't know what the trouble back there was. I just obeyed the signal. Outside of that I do not know

what was wrong.

Q. By moving westwardly, do you know whether or not that would give him more room to get out between the cars?

[fol. 74] A. Oh, yes, slack to move ahead?

Q. By moving westwardly, would that do it?

A. Well, I would be moving east.

- Q. Would that drag him or keep him tied up? A. I do not know what position he was in, sir.
- Q. Can you estimate just how long he was in between these cars? A. No.

Q. After he gave you a stop sign?

A. No, I could not.

Q. Did you pay any attention to whether or not Mr. Stewart used the pin lifter before he went in there?

A. I did not notice him.

- Q. You did not notice? A. I did not notice him.
- Q. As an engineer what do you look out for all the time?

A. Look out for signals.

Q. For signals?

A. To see that the way is clear.

Q. And when you got a stop sign from Mr. Stewart just before he went in between the cars, was your engine in motion or stationary at that time?

A. Well, as soon as he gave me the stop signal, I stopped, and I set my brake and remained set until I got a

signal from the foreman, slack ahead.

Q. After you stopped, did you pay any more attention to anything until you heard him holler?

[fol. 75] A. I was watching for a signal all the time.

Q. And by watching for a signal you could not see Stewart because he was in between the cars? A. No, I could not see him.

Q. Is that correct? In other words, when he got in between the ends of the cars you could not see his signal because the ends of the cars would block your view, is that correct?

A. I did not see him no more after he gave me the stop sign and went between the cars. That is the last I saw of it.

Q. When he went in between the cars that blocked your view of Stewart? A. Oh, yes.

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Q. In other words, you could not see?

A. No, I could not see down there between the cars.

Q. Now, explain to the jury how you could see Stewart before he went in between the cars.

A. Because he was on the ground, gave me a signal.

Q. Where with reference to the cars was he?

A. There was no obstruction between me and him when he gave me the stop signal and went in between the cars.

Q. When he was on the outside of the car you could

see him, is that correct? A. Oh, yes.

Q. When he gets on the inside, you cannot?

A. No.

Mr. Noell: That is all.

[fol. 76]

Cross-Examination.

By Mr. Davis:

Q. Mr. Martin, there was no movement of your engine that hurt Stewart, was there?

A. No, sir, no. I was standing still with the brake set.

Q. Now, what was—you were standing still when you heard him holler? A. Yes, sir.

Q. And how long had that been, do you know?

A. No, I could not say. I did not look at my watch. It was not very long, though.

Q. Would you estimate about a minute?

A. Well, perhaps.

Q. Perhaps; that is from the time you stopped until you heard him holler it was about a minute?

A. Well, I would not say for certain it was, how long it / was, it was not very long.

The Court: He never said a minute.

Mr. Davis: Sir?

The Court: He never said a minute. You asked him if it was, and he said perhaps.

The Witness: Well, I would not say just how long it was, because I did not—

Q. Well, it was after you stopped that you heard him holler, then, was it?

[fol. 77] A. Oh, yes, after he went in between the cars.

Q. Well, can you estimate that time?

A. No, I could not.

Q. Could you estimate it—was it immediately? Was it immediately after you stopped that you heard him holler?

A. Well, after I heard him-between the cars?

Q. After he was in between the cars.

A. Yes.

Q. Had your cars coupled to the other cars in any way, had your cars coupled at that time in any way?

A. Oh, I had a whole load coupled together.

Q. I know. A. Between me and him.

Q. But the cars between which he was hurt?

A. Yes, they were all coupled between me before he got hurt.

Q. But how about the cars which he was hurt in between?

A. I do not know that they was coupled, or anything about that.

Q. You do not know they were coupled or not?

A. No, I do not know nothing about that.

Q. After you stopped, and stopped still, then you saw him go in between the cars, is that it?

A. Yes, sir.

Q. Now, this was 5:40, about? A. About 5:40.

Q. Is that your recollection of the time?

Q. And that was on February 12th. Now, was the sun shining at that time?

A. Well, I don't know. I don't believe it was, I was not certain though. It was kind of bright yet however.

Q: What was the condition of the visibility?

A. Pretty clear.

Q. Was it getting dusk, that is what I mean?

A. Well, did not have the lights burning, apparently.

Q. Did not have lights?

A. He had it with him, though.

Q. Did he signal you by light or with his hand?

A. Hand.

Q. You could see his hand, could you?

A. Oh, yes.

Mr. Davis: That is all, may it please the Court.

Mr. Noell: That is all.

The Court: As I announced this morning, I intended to adjourn this afternoon at 3:30.

I do not think it is necessary to have the jury called back here tomorrow morning at 10:00 o'clock, because we have a number of motions on the docket. I think it is impossible to dispose of them before 11:00 o'clock at least, and maybe it will be later than that, so for that reason, (addressing the jury) you will not be required to come here [fol. 79] at 10:00 o'clock, but you should be here at 11:00 o'clock.

You may announce all parties, witnesses and jurors in the case on trial are excused until tomorrow morning at 11:00 o'clock.

Court adjourns until 10:00 o'clock tomorrow morning.

At this point, 3:30 P. M., Thursday, June 8, 1939, an adjournment was had until 10:00 o'clock A. M., Friday, June 9, 1939.

Pursuant to said adjournment, the Court convened at 10:00 o'clock A. M., Friday, June 9, 1939, and the further hearing of this case was resumed at 11:00 o'clock, Friday, June 9, 1939, and the following proceedings were had:

The Court: You may proceed with the case on trial.

Mr. Noell: I wish to recall Mr. Stogner.

Louis A. Stogner, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being

recalled to the witness stand, testified further on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

[fol. 80] Q. Just immediately, preceding the injury to Mr. Stewart, did you hear any noise of any kind?

A. I heard some cars hit, and then he hollered.

Q. What direction did you hear the noise?

A. Right at me, where the cars hit.

- Q. Which end of the train would you say that the noise came from? A. The east end.
 - Q. And which end was your engine on?

A. The west end.

Q. Now, I believe you testified there were two cars that he was hurt between. A. Yes, sir.

Q. One was the load and one was an empty?

A. That is right.

- Q. Do you remember what kind of a car that load wast
- A. Well, I do not remember, the recombows it was an A. R. A.

Q. A. R. A. or T. A. A. R. T.

Q. A. R. A. means a coupler? A. A coupler.

Q. And where was that car going?
A. McManus Transfer Company.

Q. McMahon Transfer Company? A. Yes, sir.

Q. Do you know whether or not at the McMahon Transfer Company the merchandise for the Illinois Emergency [fol. 81] Relief is unloaded?

A. That is where it was at that time.

Q. At that time. Now, which car with reference to point of the compass was the A. R. T. car?

A. I did not get your question.

Q. Was this an east or west car, the A. R. T. car, to the best of your recollection?

A. It was the east car, if I remember right.

Q. Now, A. R. T., isn't that what is known as a refrigerator car? A. Yes, sir.

Q. And in refrigerator cars they place usually perishable merchandise? A. As a rule, yes, sir.

Q. Foods, and so forth? A. Yes, sir.

Mr. Noell: I think that is all.

Cross-Examination.

By Mr. Davis:

Q. You mean by the east car, that which you say was the A. R. T. car, the American Refrigerator Transit car, was that the car that was not coupled to the other one?

A. Yes, sir, it was, an empty was next to it, west of it,

if I remember right.

Q. The empty was next west of it? A. Yes, sir.

Q. And when you passed those two cars you saw the knuckles about that position where they would not open? [fol. 82] A. They were all jammed up together, yes.

Q. Where they would not open?

A. Yes, sir.

Mr. Davis: That is all.

Redirect Examination.

By Mr. Noell:

Q. That was after the bump that they came together,

you saw them?

A. No, as I went back, before the bump, that was before we made any coupling, all these cars were together, they jammed up together, and the knuckles were closed on two or three couplings that I had passed and Mr. Stewart was making the couplings behind him, is that what you mean, Mr. Davis.

Mr. Davis: Well, Mr. Noel asked you the question.

The Witness: I was trying to answer.

Q. Well, in making these couplings, as you make an impact with the engine and the cars, do you not?

A. That is right.

Q. And there is more or less slack in these cars, about four to six inches in each draw bar?

A. Yes, something like that.

Q. And each time the engine had moved, why there is impacts all along there, is there not?

A. It depends on how hard you hit the first cars.

[fol. 83] Q. And some of them roll from a foot away, and sometimes farther, do they not? A. That is right.

Q. You do not know what the condition was when Mr.

Stewart went in between, do you? A. I do not, no.

Mr. Noell: That is all.

Mr. Davis: That is all.

OTTO HERE, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Q. Would you kindly state your name?

A. Otto Herr.

- Q. Where do you live, Mr. Herr?
- A. 317 North Eleventh, East St. Louis.

Q.. What is your occupation?

- A. Well, I am a clerk in the Transportation Department for the Southern Railroad.
- Q. You were subpoensed to bring in certain records in this court? A. Yes, sir.
 - Q. Have you those records with you?

A. Yes, sir.

[fol. 84] Q. And these records I presume are original records that you acquired at your office? A. Yes, sir.

Q. And you wish to take them back, of course?

A. Yes, sir.

Q. Have you a record there of a car-A. Yes, sir.

Q. En route to the McMahon Transfer Company?

A. Yes, sir.

Q. In East St. Louis, Illinois?

A. Yes, sir,

Q. What is the car number and initial of that car, according to your record?

A. It is A. R. T. 19911.

Q. And what was that loaded with?

A. Grapefruit.

Q. And where was the origin of that car?

Mr. Davis: We object to that, Your Honor. This is not shown that that is the same car-I say, it is not shown that it is the same car.

Mr. Noell: We will connect that all up, showing that this is the only car delivered to the McMahon Transfer Company that day. _

The Court: All right.

Mr. Davis: Very well.

Q. I will ask you that question right now, was that the [fol. 85] only car enroute to the McMahon Transfer that

day? A. According to the records, yes.

Q. According to your record. Now, what was the origin of that car, where did it come from and what was the destination? You have already testified the destination being the McMahon Transfer, East St. Louis, Illinois.

A. Yes, sir.

Q. Where did it originate?

A. It originated at Alma, Texas.

- Q. And who is the consignor, that is the shipper? A. I would have to look at the record for that.
- Q. Have you got it there handy? A. Yes, sir.
- Q. All right. Look at it if it won't take but a second, look at it.
- Q. It shows here, commodities purchased, secretary W. H. Quiff manager and transportation, that is all.

Q. Now, where was that car going, you say McMahon

Transfer ?

A. Well, it was billed to the Federal Surplus Commission Corporation for account of the Illinois Emergency Relief Commission for delivery to Ross P. Barnes, Superintendent, St. Clair County, 748 Walnut Street, East St. Louis, Illinois.

Q. Now, that 748 Walnut Street, is the McMahon Transfer, is it not?

[fol. 86] A. Yes, sir.

Mr. Noell: I believe that is all.

Mr. Davis: I do not think I have any questions.

(A short pause.)

Mr. Davis: We have no questions, Your Honor, please.

Mr. Noell: We have not introduced these records as exhibits because he has to take them back to his office. It is agreeable, I presume, with counsel.

Mr. Davis: Well, he has testified, Your Honor.

The Court: Yes. There is no occasion to.

(Witness excused.)

Mrs. Mary Stewart, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Q. Will you please state your name?

A. Mary Stewart.

Q. How old are you, Mrs. Stewart?

A. I am sixty.

Q. You are sixty now?

A. Well, not now. It will be my next birthday. Fifty-nine.

Q. How old was your husband at the time of his death?

A. Sixty.

[fol. 87] Q. What was the condition of his health at the time of his death? A. Well, fairly good.

Q. Did he work steadily?

A. Well, he-yes, he did.

Q. About what was his earnings? A. Well-

Mr. Davis: If she knows, Your Honor. I do not know how she could know.

The Court: Well, she might know.

Mr. Davis: Yes.

The Court: That might be developed.

Q. Do you know about what his earnings were?

A. Well, on the average of-

Q. Well, tell us how you come to know?

A. Well, he most always brought his check home and showed it to me.

Q. And about what were those checks, what would those

checks be each time you would see them?

A. Well, generally eighty, ninety, sometimes a little less and sometimes more. He has gone as high as a hundred dollars, one hundred and ten dollars, depending on the overtime he got.

The Court: That is for how long a period of work?

A. How?

Q. For how long a period is that, a week or a month?

[fol. 88] A. Well, they are paid every two weeks.

Q. Every two weeks? A. Yes, sir.

Q. Every two weeks. What would you estimate just about a rough average, would be a fair average, what would you think?

Mr. Davis: I think we have his earnings, for the last year, Your Honor, and are going to put them on the stand.

Mr. Noell: You say you will?

Mr. Davis: Yes.

Mr Noell: Well, if you will put them on, why that will be all right.

The Court: Very well. He has promised to put them on and that will be better than her estimate.

Mr. Noell: That is right.

Q. Were you dependent upon him for support, Mrs. Stewart?

A. Most surely. I was his wife. Sure, I had no one else to meet my bills.

Q. You did not have any other income? A. How?

Q. You did not have any other income?

A. No, sir.

Mr. Davis: That is immaterial, Your Honor.

Mr. Noell: Well, she must be dependent.

The Court: Go ahead.

[fol. 89] Q. Now, I will get you to state what you noticed or when was it that you learned that Mr. Stewart was injured, about what time that day or night?

A. It must have been about 6:30.

Q. In the evening; and did you see him shortly after

A. Well, just as soon as we could get ready and get down there, some of the boys weren't home, and they were going to take me down.

Q. What condition did you find him with reference to

conscious pain, suffering, if any!

A. Well, he was very distressed, and like anyone else would, with the loss of an arm, that had gone through all he had, and he was very nervous.

Q. Was he conscious when you saw him?

A. Yes, sir.

Q. And how much of the time did you see him before he died, during the days that followed?

A. Well, we was with him all that we could possibly be

with him, that was most of the time.

Q. State whether or not he suffered any conscious pain

during the times you saw him?

A. Well, from the expression of his face and the way he tried to talk, and all, to explain to us, he was just that afraid that we would touch the bed, or touch anything per[fol. 90] taining to the bed that would cause him pain.

Q. About what time did he die?

A. About 9:30, or something like that.

Q. About 9:301

A. About 9:30 or something in that time, I think.

Q. With reference to the day he was hurt what time did he die, was it the same day?

A. No, he was hurt Friday evening and he died Sunday

evening.

Q. He died Sunday evening? A. Yes, sir.

Q. About 9:201 A Yes.

Q. I believe you were, you have been appointed administratrix? A. Yes, sir.

Mr. Noel: I believe that is all.

Cross-Examination.

By Mr. Dayis:

Q. Mrs. Stewart, what time was it when you first saw him, about 6:30 on February 12th, the day he was injured?

A. No. It was later than that, it was about that time

that they came to notify me.

Q. Well, when did you see him?

A. Just as I told you.

Q. Well, what time I mean.

A. As soon as we could get there.

The Court: He wants to know about what time in the evening, about how much longer it was after that.

[fol. 91] A. Why, I judge forty minutes.

Q. Forty minutes.

A. At that time I was in—well, worked up, that I don't remember exactly.

Q. No, no, you do not remember the exact time but as near as you remember, then, it was somewhere around 7:30, would you say that?

A. About that time, yes.

Q. About 7:30? A. About that time.

Q. Where was he at that time?

A. He was at St. Mary's Hospital.

Q. And where was he did you see where he was injured!

A. I seen as much as I could see. They had it all ban-

daged up.

Box Broke

Q. Had it been bandaged up? A. Yes.

Q. Was his hand on at that time?

A. Was his hand on?

Q. Yes.

A. Well, I do not see how it could be on when it was amplitated, or took off and was bandaged up.

Q. It had already been amputated, had it?

A. Yes, sir, it had the first day.

Q. That is what I want to know. Where was it amputated do you know, up near the elbow?

A. It looked the way it was wrapped like it was below

the elbow.

Q. But I say, up near the elbow?

A. Near the elbow, yes, sir.

[fol. 92] Q. About how far from the elbow, do you know?

A. Well, now I could not tell from the amount of bandage they had on there, I could not tell you.

Q. You could not tell, I see.

Q. Now, Mrs. Stewart, he drank, did he not, Mr. Stewart!

A. Well, he was a moderate drinker, yes.

Q. Well, he was off a great many days because of drinking, was he not? A. I could not say that.

Q. Well, he was off some days because of drinking, was

he not?

A. Not every time that a man lays off from work does he lay off from drinking.

Q. Oh, no. There were times he did lay off, from drink-

ing, was there not?

A. He might lay off a day, but you don't have to be a drunk all day because you lay off a day.

Q. But he laid off because of drinking?

A. Well, I could not say that.

Q. You could not say that? A. No, sir.

Q. Didn't you tell the doctor that he had been a heavy drinker and that he did not work because he was drinking?

A. No, sir.

Q. You never told the doctor that? A. No, sir.

Q.* He had been off a few days previous to this time, did he not?

[fol. 93] A. He did because we moved, and he did the helping of the move. We looked for a house and packed and moved, straightened our things up after we moved.

Q. Where were you living?

A. We were living on St. Louis Avenue, and we moved right around the corner on Sixteenth.

Q. Around the corner on Sixteenth; and did you have a moving van?

A. Well, we did not have our own furniture.

Q. You did not have?

A. We lived in a furnished apartment at that time.

Q. You were; where you were living before you moved was a furnished apartment, wasn't it?

A. Yes, sir.

The Court: It is now just the usual time for the noon recess.

Mr. Davis: All right.

The Court: I will announce a recess until 2:00 o'clock.

At this point, 12:30 P. M., Friday, June 9, 1939, a recess was had until 2:00 o'clock P. M.

After recess, at 2:00 o'clock P. M., Friday, June 9, 1939, the following proceedings were had:

[fol. 94] The Court: You may proceed with the case on trial.

Cross-Examination (Resumed).

By Mr. Davis:

Q. Mrs. Stewart, you said your husband was sixty years of age? A. Yes, sir.

Q. At the time of his death? A. Yes, sir.

Q. When was his birthday, when would he have been sixty-one?

A. He would have been sixty-one in August.

Q. In August, what day in August? A. The 4th.

Q. The 4th of August. Now, Mrs. Stewart, you were appointed administratrix of the estate of your deceased husband, John R. Stewart, on the 16th day of April, 1937, were you not? A. Yes, sir.

Q. And that was by the Probate Court of St. Clair

County, Illinois, at Belleville, Illinois?

A. Belleville.

Q. Yes. And how long had your husband—I have overlooked asking you this question. How long had your husband been working for the Southern Railroad at the time of his death! A. For twenty years, I judge.

Q. Twenty years? A. Yes, sir.

Q. Had he ever worked for any other railroad? [fol. 95] A. During that time?

Q. No, not during that time, before?

A. Oh, he had worked for the railroad company ever

since he was sixteen or seventeen.

Q. Sixteen or seventeen years of age. Now, on November 30th, 1937, you presented a petition to the Probate Court of St. Clair County, Illinois, to be permitted to settle this case, did you not?

Mr. Hay: Just a moment, Your Honor. That goes into the other phase of this case about which there was no interrogation of the witness on the stand.

The Court: Read the question.

(Question read.)

The Court: Sustained.

Mr. Davis: Your Honor, I understand the rule if we desire to examine her about that she may be our witness to that effect?

The Court: Well, that is true, you make her your witness.

Mr. Davis: To that extent only.

The Court: You have a right to make her your witness, yes. As a matter of orderly procedure, I do not know that you have a right to do it at this time.

Mr. Davis: Sir?

[fol. 96] The Court: I do not know that you have a right to do it at this time, as a matter of orderly procedure you make her your witness in the presentation of your own case, you have that right. I do not think you necessarily have a right to make her your witness at this time.

Mr. Davis: Well, we are not going to do that, Your Honor, but I will ask that this be marked Defendant's Exhibit No. 1, and that this be marked Defendant's Exhibit No. 2, and that this be marked Defendant's Exhibit No. 3.

(Certain papers were marked by the reporter as Defendant's Exhibits Nos. 1, 2 and 3, respectively.)

Q. Mrs. Stewart, I will show you Defendant's Exhibit No. 1, and ask you if that is your signature to it?

Mr. Hay: That goes into the same matter, Your Honor.

The Court: The objection will be sustained.

Mr. Hay: As a matter of orderly procedure we insist on following the proper procedure.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Mr. Davis: I think that is all, Your Honor.

Mr. Noell: That is all.

[fol. 97] Mrs. MINNIE HAMM, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Q. Please state your name? A. Minnie Hamm.

Q. Where do you live?

A. 1521 Gaty, East St. Louis.

Q. What is your husband's name?

A. Henry Hamm.

Q. I wish you would state what time you got to the hospital after your father was injured—oh, I said your father. I assume you are a daughter of John R. Stewart, deceased? A. Yes, sir.

Q. . What time did you get there?

A. It was a little after 6:00, I guess. I do not remember exactly.

Q. You received some notice that he had been injured?

A. Yes. His arm was all bandaged, and we knew of course what had happened.

Q. Did you go down by yourself or with somebody else?

Mr. Hay: A little louder.

Q. Talk louder so the gentleman at this end can hear you. I am standing back here so that we can hear you.

A. My mother and I went.

Q. Please tell the Court and jury what you saw and know with reference to his suffering conscious pain? [fol. 98] A. Well, my dad was in pain, of course, and he had already been taken care of by first aid. They had taken the remainings of his arm off, you know, as soon as they could before they give him further treatment.

Q. A little louder.

A. It was heavily bandaged, of course, after this first aid treatment they had given him and he was in very much pain.

Q. Now, when did he pass away, what hour and day did

he pass away?

A. That was Friday evening, and he passed away Sunday evening, Sunday night, rather, about 9:20.

Q. State what portion of that time he was conscious,

to your knowledge?

A. Well, about all of the time we were there, as much as we could, and all of that time he was conscious.

Q. What was he doing and saying during that time you

saw him?

A. Well, his pain was so intense that he just talked, intervals it seemed like he would be talking to us and then his mind would go so strongly toward his arm he could not continue his subject, he would just sit and close his eyes, you know, just as if the pain was so strong he could not remember.

Mr. Davis: We object to what it looks like.

The Court: Sustained.

The Witness: Well, it seemed that way.

[fol. 99] Mr. Davis: We object to what it seemed.

The Court: Sustained.

Q. What position did you place his expression on his face during the time you mentioned with reference to it showed very much pain?

Mr. Davis: We object to that question.

The Court: Read the question.

(Question read.)

The Court: Sustained.

Q. Did he have any expression on the face [—] denoted, that you observed, that indicated any conscious pain?

Mr. Davis: We object to that. That is a conclusion.

The Court: Well, there ought to be some form.

Mr. Davis: Yes. I think there is a form.

The Court: In which that question can be asked. I think perhaps it is in improper form.

Sustained.

Q. What audible sounds, if any, did he make with his voice?

A. Groaned and moaned, and as anyone would that were in pain and agony.

Mr. Davis: Wait a second. He did not ask anything further. Excuse me, please, may it please the Court.

The Court: Sustained as to anything further.

Mr. Noell: As to groans and moans, the Court's ruling [fol. 100] is that that may be—

The Court: That may stand, yes.

Q. Do you remember when his arm was amputated?

A. The following day, in the afternoon, around 3:00 o'clock.

Q. Was there any part of his arm taken off the first night or day?

A. Just a part of it that had been-

Mr. Davis: I do not understand.

A. Just the part that had been so torn, which just had to be taken off.

Q. What part was that?

A. Well, just, I would say that mid-section.

Q. You indicated now to me between the elbow and-

The Court: She indicates the mid-section of the forearm, do you not?

A. Yes. Yes, sir.

Q. What was the condition of your father's health before this accident? A. It was good.

Q. About how heavy a man was he?

A. I judge around 165. Q. And about how tall?

A. Five foot seven, maybe eight. I would not be sure.

Mr. Noell: I believe that is all.

Cross-Examination.

By Mr. Davis:

[fol. 101] Q. Now, you got there at what time on the night of his injury?

A. I said around 6:20, didn't I, 6:30?

Q. That you got over there? A. Yes, sir.

Q. To the hospital? A. Yes, sir.

- Q. And you say they had amputated part of his arm at that time?
- A. No. They just cleared the tear, probably, I guess that is what you would call it.

Q. Cleared the tear?

A. Well, it was caught in the car, you know.

Q. Yes.

- A. And it was hanging there when they took him to the hospital. Naturally they had to cut the remains beneath off, that is what was off.
- Q. And it showed at that time that it was crushed about halfway between the wrist and elbow, is that it?

A. It was practically cut in two.

Q. Between the wrist and elbow? A. Yes.

- Q. That is where it was cut in two, between the wrist and the elbow? A. Yes, sir.
 - Q. The hand was not injured, was it?

A. Well, it might as well been, it was not there, if you get what I mean. I am not being sarcastic; it was just so near that it was not any use to him.

Q. I say, the hand itself.

A. No, sir, the arm was caught.

[fol. 102] Q. The arm was caught, as you say, halfway between the elbow and the wrist? A. Yes.

Q. And the hand was still there when you first saw it?

A. I did not see it. I said it was taken off when we got there, and a bandage on.

Mr. Davis: That is all.

Redirect Examination.

By Mr. Noell:

Q. Just one other question. What did you notice with

reference to hemorrhages of the wound?

A. Let's see. Well, that night I believe it was heavily bandaged, as far as I remember, there we e spots of blood showing through, because it was right after it happened.

Q. And then during the next two or three days what

did you notice?

Mr. Davis: Now, Your Honor, that question is limited, if he limits it to two days.

Q. Make it two days.

A. Well, all the time I was there they were changing and changing these bandages. They just soaked through with this blood that kept coming to the top, you know, it just kept showing up.

Q. What effect did you notice it had on his strength?

A. Well, it naturally kept ebbing his strength that he did have.

[fol. 103] Mr. Davis: We object to that. I do not think she is a physician, and she cannot tell, and I ask that it be stricken out.

The Court: Sustained.

Mr. Hay: I should not think it would take much of an expert to determine that.

Q. I will ask you this question. Did he appear to grow weak? A. Yes, he did.

Mr. Davis: We object to the same question.

The Court: I could not hear counsel's question.

Mr. Noell: I say, did he appear to grow weaker?

Mr. Davis: We object to it as a conclusion of the witness.

Mr. Noell: Become more weak until the last day.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Mr. Noell: Now, you may answer. The Court has ruled.

The Witness: Yes, sir. He did.

Mr. Noell: That is all.

Mr. Davis: That is all.

Mr. Noell: Will you mark this, please, as plaintiff's Exhibit "B"?

[fol. 104] (A paper was marked by the reporter as Plaintiff's Exhibit "B":)

Mr. Noell: I would like to introduce in evidence Plaintiff's Exhibit "B", which is an authenticated copy under the Act of Congress of the Letter of Administration granted to Mary Stewart.

Plaintiff's Exhibit "B" Offered in Evidence.

(Said Plaintiff's Exhibit B is the Letters of Administration issued to Mary Stewart, and is the same as Exhibit A to the Second Amended Answer appearing at folio page 12 of this printed record, and is therefore omitted at this place to avoid duplication.)

DOROTHY RUTH, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Mr. Noell: Will you mark this please, as Plaintiff's Exhibit "C".

(A paper was marked by the reporter as Plaintiff's Exhibit "C".)

Q. Will you please state your name?

A. Dorothy Ruth.

Q. Where do you live?

A. 1370 North 31st Street.

Q. What is your occupation? A. Nursing.

The Court: Wait. North 31st Street?

A. East St. Louis.

Q. What is your occupation? A. Nursing, registered nurse.

Q. Did you have occasion to nurse John R. Stewart [fol. 105] along about February, 1937? A. I did.

Q. Where was that at?

A. St. Mary's Hospital, East St. Louis.

- Q. Do you remember the date and the hour that you first saw him as a nurse?
- A. It was St. Mary's Hospital at East St. Louis, February 12th, and he was admitted at 6:40.

Q. And what time did you see him?

A. Eight o'clock.

Q. Eight o'clock that evening. What condition did you

find him in, Miss Ruth?

A. The condition of Mr. Stewart when I reported on duty with him, he was very nervous and worrying about his condition; and complained of [a] considerable pain.

Q. Was he conscious? A. Yes, sir.

Q. Was he conscious all the time that you saw him?

A. He was.

Q. Describe the injury to his body that you found at that time.

A. Well, I never had any occasion to take the bandage off. The doctor had put it on in the emergency room, but it was a bandage on it at that time, it was saturated with blood.

Q. Were you on duty at 12:00 A. M.—well, you went on duty from 11:00 o'clock until when, Miss Ruth?

A. 11:00 to 7:00.

[fol. 106] Q. 11:00 to 7:00?

A. The second night. The first night I was on from 8:00 to 7:00.

1 see. Can you tell us, describe what noises he was

making during the time you were his nurse?

A. Well, he did not seem to be noisy. He, just complained of considerable pain and by his facial expression and worrying about his condition, was wendering whether his arm would have to be amputated further.

Q. Was the arm amputated after that?

A. As far as I can remember, oh, yes, after that it was, above the elbow.

Q. Did the arm ever discontinue hemorrhaging?

The Court: Wait, just a minute. You say the arm was amputated above the elbow?

A. Above the elbow the following day, the 13th of February, 3:00 P. M.

The Court: All right.

Q. Where was it taken off first, if you remember?

A. I do not quite remember, but I think it was underneath the elbow, and then the following day it was taken above the elbow.

Q. Yes. Did he ever discontinue hemorrhaging during

the entire time that you were nursing him?

A. Not until after the amputation, there was a slight [fol. 107] oozing there, and a tourniquet was applied several times.

Q. You had difficulty, did you, to stop the flow of blood?

A. Not after applying the tourniquet, we had it there in readiness in case of emergency.

Q. As I understand you, he was conscious during the time that you nursed him? A. Yes, sir.

Q. Those two days? A. Yes.

Mr. Noell: That is all.

Cross-Examination.

By Mr. Davis:

Q. You saw him about eight o'clock, did you?

A. Yes, sir.

Q. Did you see his hand? A. No, sir.

Q. Where was the injury?

A. Well, I could not tell much where the injury was because we had no occasion of removing the dressings after they had been applied.

Q. Now, when the dressing was applied where did it ex-

tend to1

A. Up to about here (indicating).

Q. To about the middle between the wrist and the elbow? A. Yes, sir.

Q. And do you know what he died of? A. I do not.

Q. You do not know what he died of. He did die, did he? [fol. 108] A. Yes, sir.

Q. Were you there when he died?

A. Not at that time. I came on duty at 11:00 and he died at 9:20.

Mr. Davis: I think that is all.

One second, please.

Q. He had no other injury except to his arm, that was the only injury that you saw, was it?

A. That is all that I saw.

Mr. Davis: That is all that you saw.

The Court: You do not know if he had any other injury, though?

A. I do not.

Redirect Examination.

By Mr. Noell:

Q. One other question. The only thing, as I understand your testimony, he said was about his condition,

worrying about his arm, is that correct?

A. Yes, sir. The first evening he talked more to me when I came on at 8:00 o'clock, and he was wondering whether they would have to amputate his arm any further, and he said he was wondering, he said he would not be able to go back to switching. Well, the only thing I could do was comfort him and told him not to worry about his condition at that time, that maybe they would give him an [fol. 109] easier job when he returned.

Mr. Noell: I believe that is all.

Mr. Davis: That is all.,

MAY THORNTON, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Q. Will you please state your name?

A. May Thornton.

Q. Where do you reside?

A. 1305 Cleveland Avenue, East St. Louis, Illinois.

Q. What is your occupation, Miss Thornton?

A. Nursing.

Q. Are you a registered nurse! A. Yes, sir.

Q. Did you have occasion to nurse Mr. Stewart, as one of his nurses, in February, 1937? A. I did.

Q. When was that, what date did you go on duty?

A. I went on February 14th at 9:00 A. M. and worked until 3:00 P. M.

Q. In other words, you were there on the last day that he lived? A. Yes, sir.

Q. Was he conscious?

A. Yes, he was conscious.

[fol. 110] Q. Do you know whether he suffered any conscious pain during that time?

A. Yes. I feel that he did.

Q. He did? A. Yes, sir..

Q. Just what did he say to indicate that he was complaining of conscious pain, or just what did he say, just describe to the jury what you recollect.

A. Well, in conversation he did not say anything. He was restless, tossed around the bed covers, could not be comfortable, and just miserable, wholly, in general.

Q. Just describe what sounds he made, if any.

A. Well, he groaned some, and he mouned, and he was muttering, kind of talking. I could not make out just what he said, but the way he changed and shifted his position, why I felt that he was uncomfortable.

Mr. Davis: Well, now, not what you felt. Excuse me, if the Court please.

The Witness: I beg pardon?

Mr. Davis: Not what you felt, what he did.

The Witness: All right. Well, he was restless, and moved around the bed and could not, apparently, get comfortable at all. He was just miserable.

Mr. Noell: Now, that was the day he died, was it?

A. Yes, sir, that is the day I was with him.

[fol. 111] Q. And you went off of duty on that day at-

A. 3:00 P. M.

Q. Of course, you do not know what happened after 3:00 P. M.?

A. I do not.

Q. Miss Fitzgerald, believe, was subpoenaed, but she is ill and cannot attend court, is that your understanding?

Mr. Davis: Well, now that is wholly immaterial, Your Honor-I think.

Mr. Noell: Well, we would like to show that the other nurse is ill. She has been subpoensed but she can't be here because she is ill.

I would like to show that by this witness, to explain her absence.

The Court: Very well.

Q. Do you know that? A. I do.

Mr. Noell: That is all.

Mr. Davis: That is all.

Mr. Noell: We would like to read in evidence this stipulation.

(The stipulation referred to is marked Plaintiff's Exhibit "C".)

Mr. Noell: We desire to read in evidence, omitting the caption, this stipulation, which is as follows:

[fol. 112] (Plaintiff's Exhibit C.)

"Stipulation.

It Is Hereby Stipulated And Ageed by and between the Parties hereto, that at the time mentioned in plaintiff's petition and on the track mentioned in plaintiff's petition,

namely, Track No. 12, there were seventeen (17) cars and that twelve (12) of them at the time were moving an interstate commerce.

The above stipulation may be read or used at the trial in the case of Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff, versus, Southern Railway Company, a corporation, defendant, now pending in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

CHAS. P. NOELL,

Attorney for Plaintiff.

S. B. McPHEETERS &

KRAMER, CAMPBELL, COSTELLO & WIECHERT,

Attorneys for Defendant.

Mr. Noell: That is the plaintiff's case, Your Honor. Plaintiff rests.

(Here ensued a colloquy between Court and counsel, out of the hearing of the jury.)

The Court: Let the record show that plaintiff's counsel requested that the case be reopened to hear this one additional witness, and it is granted.

[fol. 113] Henry Martin, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Q. Does the Southern Railway Company operate passenger trains here in St. Louis?

A. Yes, sir.

Mr. Davis: We object to that unless he knows, absolutely knows.

The Court: Maybe he does not know. We will find out.

The Witness: Yes, sir.

The Court: What is he, an engineer, isn't he?

Mr. Noell: He is an engineer.

Q. How long have you been working for the Southern!
A. January, 1900, until—

The Court: I do not care how many years they have operated. Let's find out.

Mr. Noell: Yes. On February—when is the date this suit was filed? The commencement of the suit is the time that is pertinent.

Q. On April 20, 1937, when this suit was commenced, [fol. 114] was the Southern Railway Company operating trains in and out of the Union Station?

Mr. Davis: If you know.

The Court: Yes. Don't answer if you do not know.

A. I do not know.

Mr. Davis: That calls for a conclusion, may it please the Court.

Mr. Hay: Yes. I think he ought to describe accurately the movement of the train, Your Honor, and be sure that they are running when they are running.

Mr. Sheppard: Your Honor, counsel just does not understand. This is not a technical objection. This objection has real merit to it.

The Court: I understand.

Mr. Hay: Yes. I understand.

Mr. Sheppard: You do not. You do not understand at all.

The Court: Read the question.

(Question read.)

The Court: Do you mean the City of St. Louis, Missouri?

Q. In the City of St. Louis, Missouri?

A. I do not know.

Mr. Noell: Well, then, we will have to subpoena the [fol. 115] general agent and put him on. He ought to know.

Sit down, Mr. Martin. I will call another witness here. Maybe he might know.

The Court: You may step down, Mr. Martin. You are excused.

(Witness excused.)

Mr. Noell: This gentleman here (indicating to a person) will you come forward? I believe you are an employee of the Southern.

I might put Mr. Davis on. He ought to know that. He is up there at Union Station.

Mr. Sheppard: Suppose you do that.

THOMAS RUSSELL, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

· Direct Examination.

By Mr. Noell:

Q. State your name. A. Thomas Russell.

Q. Where do you live?

A. 564 North 14th Street, East St. Louis.

- Q. Do you know whether or not the Southern Railway Company operates trains into Missouri, St. Louis, Missouri?
 - A. I do not.
 - Q. You do not.

Step aside.

[fol. 116]

Cross-Examination.

By Mr. Davis:

- Q. Let me ask you one question. You were the fireman on the train that, at this time that Mr. Stewart was injured?
 - A. No, sir.
 - Q. You were not? A. I was a switchman.
 - Q. You were a switchman? A. Yes, sir,
- Q. And were you working with Mr. Stewart at that time?

A. Yes, sir.

Q. Now, do you know anything about this accident yourself?

A. No, sir.

Mr. Davis: That is all I wanted.

Redirect Examination.

By Mr. Noell:

Q. You were about twenty-five car lengths away?

A. Yes, sir.

Mr. Noell: That is all.

(Witness excused.)

Mr. Noell: Well, do you admit that you operate trains here?

Mr. Lucas: No.

Mr. Noell: You do not operate any passenger trains?

Mr. Sheppard: We do not admit we operate any passenger trains into St. Louis, the Southern Railway.

[fol. 117] Mr. Noell: You do not admit that?

Mr. Sheppard: No, sir.

Mr. Davis: Get the facts. We will admit the facts. I know what I have heard.

Mr. Lucas: It is all hearsay, what I know.

Mr. Noell: Where is Mr. Haun, the claim agent?

Mr. Sheppard: I do not know. He was here a minute ago.

Mr. Davis: We can call him, if you desire.

H. B. Haun, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Noell:

Q. Please state your name. A. H. B. Haun.

Q. What is your occupation?

A. I am claim agent for the Southern Railway Company.

Q. Where does the Southern Railway Lines extend

westwardly to eastwardly?

A. We extend westwardly to the Mississippi River at

three points, St. Louis, Memphis and New Orleans.

Q. How many trains a day does the Southern Railway Company operate out of St. Louis, Missouri?

Mr. Hay: Wait a minute.

[fol. 118] A. We do not operate any out of here.

Q. Do you do business in St. Louis, Missouri?

Mr. Sheppard: Oh, now, Your Honor, that calls for a legal conclusion.

The Court: Sustained.

Q. What business do you do in St. Louis, Missouri?

A. I do not do any. My office is on the East side. I live on this side.

Q. Does any of your equipment come over in passenger trains?

A. Yes, sir.

Q. And that is hauled by Terminal engines?

A. Yes, sir, on Terminal rails.

Q. On Terminal rails? A. Yes, sir.

Q. And your equipment is Southern Railway coaches and pullman cars?

A. Well, it is so stenciled on the side of the cars.

Q. And the conductor on that train is an employee of the Southern Railroad Company?

A. Yes, sir.

Q. And the flagmen of those trains are employees of

the Southern Railway, is that correct?

A. Yes, sir, and under the jurisdiction of the Terminal Railroad while on their rails, subject to their rules and regulations, as I understand it.

Q. Do you have ticket offices here in St. Louis?

[fol. 119] A. I do not know where it is.

Mr. Davis: Well, even if they do, that is not a question of doing business or of operating; the courts have so held, as I understand, ticket offices.

Q. Just state what offices you have in St. Louis, Missouri?

Mr. Davis: Well now I do not object to that.

The Court: All right then, we will have an answer.

A. Well, we have a Mr. Hughes, who is rated as superintendent of Terminals, whose office is in the Chemical Building on Olive Street; and we have some other kind of office in that same building, just the nature of it I am not acquainted with. It is aside from my department. I have no dealings with it.

Q. About how many passenger trains do you operate

in and out of Union Station?

A. Do not operate any in and out of Union Station, St. Louis, Missouri.

Q. Where do you operate them from St. Louis, Mis-

souri? A. We do not.

Q. Where do the passengers get on your trains to go to the Atlantic Seaboard and points east?

A. Well, there is fifteen states they get on our train.

Q. In St. Louis where do they get on your train?

A. At Union Station.

[fol. 120] Q. Yes. And they get on the Southern Railway equipment, do they? A. It is so stenciled.

Q. And that conductor and flagman on that train continue on that train for how many hundred miles before

they are relieved?

A. Well, the conductor I think goes to Louisville, Kentucky.

Mr. Noell: Yes. That is all.

Mr. Davis: That is all.

(Witness excused.)

Plaintiff Rests.

Mr. Sheppard: Now, the record will show now that we move for a directed verdict, that we file our motion for a directed verdict.

The Court: 'Very well.

At this point, the defendant, by its counsel, filed with the Court, in writing, its motion for a directed verdict, in words and figures as follows, to-wit:

(Motion of Defendant for Directed Verdict.)

(Omitting formal caption)

"At the close of plaintiff's evidence and case, the defendant herein, Southern Railway Company, moves the Court to direct the jury to find a verdict in favor of defendant and against plaintiff, for the reasons following:

- 1. That under the applicable rules of law, there was [fol. 121] and is no substantial evidence adduced in this case showing or tending to show that defendant herein was or is guilty of any actionable negligence or want of duty whatever as charged in the petition.
- 2. That under the applicable rules of law, there was and is no substantial evidence adduced in this case that any actionable negligence or want of duty whatever of defendant was and is the direct and proximate cause of the fatal injuries received by plaintiff's intestate as charged in the petition.
- 3. That under the applicable rules of law, there was and is no substantial evidence whatever in this case showing or tending to show any violation of any duty as charged in the petition.
- 4. That under the applicable rules of law, plaintiff cannot recover in this case, because the substantial evidence herein unequivocally shows that plaintiff filed in the Probate Court of St. Clair County, Illinois, a petition, duly signed and verified by her, praying that, as administratrix of the Estate of John R. Stewart, deceased, the said Probate Court order that, as such administratrix, she be allowed, for the sum of Five Thousand Dollars, in full set-[fol. 122] tlement of all claims and demands on account of the fatal injuries to John R. Stewart, deceased, to accept said sum of money, and to execute and deliver to said defendant a release in writing, fully releasing, settling and satisfying all claims, demands and rights of every kind, nature and description which she, as such administratrix of said estate, had on account of the fatal injuries to said

deceased; that said petition was presented to said Probate Court and said Probate Court entered an order approving said settlement for Five Thousand Dollars and authorized her, as such administratrix, to settle said claim with defendant and to execute and deliver to said defendant a full and complete release upon the payment of said sum of money; that in consideration of the execution of a full and complete release by her, as such administratrix. the defendant herein paid her the sum of Five Thousand Dollars, as such administratrix, and, as such administratrix, she executed and delivered to defendant a release, thus, releasing and discharging defendant from all claims. demands, actions, and rights of action that she then had or might thereafter have, as such administratix, against defendant by reason of the fatal injuries to John R. Stewart, deceased, and specifically accepted the sum of Five Thousand Dollars in full settlement of this cause of action [fol. 123] and appropriated the said sum of money to her own use as such administratrix; that thereafter she filed a petition in said Probate Court of St. Clair County, Illinois, and moved said Court to set aside the settlement of said claim and cause of action herein, which said petition, to set aside the settlement and approval of settlement for fatal injuries to her decedent, the said Probate Court of St. Clair County, Illinois, denied. On these facts, the defendant moves the Court to direct the jury to find a verdict in its favor, because, as the authority of plaintiff to settle as such administratrix or the settlement thereunder had not been revoked or set aside by the Probate Court, or some other court of competent jurisdiction in Illinois, if any, this cause of action is a collateral attack on the orders and judgments of said Probate Court of St. Clair County, Illinois; of all of which aforesaid matters only the Probate Court of St. Clair County, Illinois had full jurisdiction.

- 5. That under the applicable rules of law, there was and is no substantial evidence in this case showing or tending to show that defendant, its agents or servants was or is guilty of any actionable fraud whatever.
- 6. That under the applicable rules of law, there was [fol. 124] and is no substantial evidence in this case show-

ing or tending to show that defendant was or is guilty of any actionable duress whatever.

- 7. That under the applicable rules of law, there was and now is no substantial evidence in this case impeaching or tending to impeach the execution by the plaintiff of the release offered in evidence in this case.
- 8. That under the applicable rules of law, there was and now is no substantial evidence in this case showing or tending to show that there was any fraud or duress whatever in the matter of the execution of the release offered in evidence, nor is there any substantial evidence showing or tending to show that the plaintiff, at the time she executed the release in question did not know that she was executing a full release, discharging the defendant from all claims, demands, actions or rights of action that she then had or might thereafter have as such administratrix against the defendant by reason of the fatal injuries to her intestate.

Wherefore defendant respectfully asks that the Court may hold as above specifically prayed and direct the jury to return a verdict in favor of defendant.

SOUTHERN RAILWAY COMPANY,
By Wilder Lucas,
Arnot L. Sheppard,
Walter N. Davis,
Its Attorneys of Record."

[fol. 125] Which said motion was by the Court marked "Overruled".

And to which action of the Court in refusing the said motion, the defendant, by its counsel, then and there at the time duly excepted.

The Court: Unless it is a very great hardship on some member of the jury, I prefer to continue in this case through tomorrow morning until the usual hour of adjournment at 12:30.

If it is any very great hardship on any juror I will consider what he has to say; otherwise I will announce now we will run through until 12:30 tomorrow.

Very well, gentlemen, we will continue through until 12:30 tomorrow.

No juror will be heard to complain hereafter.

And thereupon, the defendant, to sustain the issues in its behalf, offered the following evidence:

R. H. Wiechert, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination.

By Mr. Davis:

Q. Mr. Wiechert, won't you please state your name?

A. R. H. Wiechert.

[fol. 126] O. And what is your profession? A. Lawyer.

Q. Are ou a member of any firm?

A. Of the firm of Kramer, Campbell, Costello and Wiechert at East St. Louis.

Q. And are you attorneys for the Southern Railway

at East St. Louis?

A. Yes, sir. We are attorneys, division counsel for the Southern Railway Company.

Q. Where does your division,—does that include St.

Louis? A. That includes Illinois and Missouri.

Q. Now, do you know Mr. or Mrs. Stewart?

A. I met her once.

Q. And when was that?

A. On November 30, 1937.

Q. Generally what was the occasion of your meeting with her? A. She and her daughter—

Q. No, just generally the occasion, for what purpose?

A. For the purpose of putting through a settlement on account of the death of her husband.

Q. Now, did she execute a settlement?

A. Execute a what?

Q. A settlement? A. Yes, she did.

Q. A release. I will ask you if that—this is Defendant's Exhibit 3 here. I will ask you if that is the release, or whose signature is that to that release?

A. That is Mrs. Stewart's signature.

[fol. 127] Q. I will ask you, or I will show you Defendant's Exhibit No. 2, and ask you what that is.

A. That is a voucher given to her in payment of the settlement and release.

Q. What case, of the case of Mary Stewart versus the—

A. The Southern Railway Company.

Q. Pending in the United States District Court.

A. In this court.

Q. Of St. Louis, Missouri? A. Yes, sir.

Q. Do you know whose signature that is on the back of that part of Exhibit No. 2?

A. I presume that is Mrs. Stewart's signature, but I was not present when that signature was put on the back.

Q. I will show you Defendant's Exhibit No. 1, and ask you whose signature that is to that instrument?

A. That is the signature of Mrs. Stewart, Mary Stewart.

Q. And I will ask you generally what that is.

A. That is a petition to the Probate Court of St. Clair County, Illinois.

Q. Of Mrs. Mary Stewart?

A. Of Mrs. Mary Stewart, of Mary Stewart, rather.

Q. Asking to be permitted to settle the case in the matter of John R. Stewart against the Southern Railway?

A. Well, asking for the approval of the court in the [fol. 128] settlement of that case.

Mr. Davis: Now, may it please the Court, we offer Defendant's Exhibit Nos. 1, 2 and 3 in evidence.

The Court: Very well.

Mr. Hay: May I see this.

Mr. Noell: No objection.

Mr. Davis: Gentlemen, I will read this.

Defendant's Exhibit No. 1.

"In the Probate Court of St. Clair County, Illinois.

In the Matter of

the Estate of John R. Stewart, Deceased.

To the Honorable Paul H. Reis, Judge of Said Court:

Your petitioner, Mary Stewart, respectfully represents that she is the widow of John R. Stewart, deceased, and is

by appointment of this Honorable Court administratrix of the estate of said deceased, and that said deceased was injured on February 12, 1937, in his employment as a switchman for the Southern Railway Company, from which injuries he died on the 14th day of February, 1937, and that at the time of said injuries said deceased and the said Southern Railway Company were engaged in interstate commerce.

Your petitioner further represents that the said Southern Railway Company has offered and agreed, provided a [fol. 129] a full and complete release can be obtained, to pay to your petitioner as such administratrix aforesaid the sum of Five Thousand Dollars (\$5,000.00), in full settlement of all claims and demands on account of said fatal injuries to said deceased.

Your petitioner further represents that it is for the best interests of said estate and all persons interested therein to make said settlement, and prays that an order be entered in this court approving this settlement as aforesaid and authorizing and directing petitioner, as administratrix of said estate, to make said settlement, and upon payment to her of Five Thousand Dollars (\$5,000.00) to execute and deliver to the said Southern Railway Company a release in writing, fully releasing, settling, satisfying and determining all claims, demands, and rights of action of every kind, nature and description which she as such administratrix of said estate has on account of the fatal injuries to said deceased.

Petitioner further represents that one Charles P. Noell, whose business address is 1502 Telephone Building, in the city of St. Louis, Missouri, claims to have a lien for attorney fees out of any amount which petitioner receives, or is to receive, in settlement of her claim for the death of said deceased against said Southern Railway Company, [fol. 130] and petitioner further represents that any such lien which the said Charles P. Noell may claim is null and void and of no force and effect, and that said Charles P. Noell is not entitled to attorney fees or any lien for attorney fees on said settlement.

Petitioner further prays that an order be entered by the Court herein directing the Clerk of this Court to serve notice upon the said Charles P. Noell to appear in this cause by a short day to be fixed by the Court, to assert and present his claim, if any, for attorney fees, or lien for attorney fees against this petitioner arising out of said settlement.

Dated this 30th day of November, A. D. 1937.

(Signed) MARY STEWART,
Administratrix of the Estate of
John R. Stewart, Deceased.

State of Illinois, County of St. Clair.—ss.:

Mary Stewart, after being duly swork, upon her oath deposes and says that she is Administratrix of the Estate of John R. Stewart, deceased, and petitioner in the above and foregoing petition, and that she has read said above and foregoing petition and that the facts therein stated are [fol. 131] true and correct.

(Signed) MARY STEWART,

Subscribed and sworn to before me this 30th day of November, A. D. 1927.

(Signed) L. O. REINHARDT, Clerk of The Probate Court.

Defendant's Exhibit 2.

To Mary Stewart Admx of the estate of John R. Stewart Deceased and A. R. Felsen Att'y

......

East St. Louis, Illinois.

For amount in full settlement of all claims for Fatal injuries to John R. Stewart Dec'd person or property received at or near East St. Louis, Illinois, on or about the 12th day of February, 1937, and for all results attending

of following said injuries, including funeral expense and all other claims of whatsoever nature, also in full settlement of Suit brought by the said Mary Stewart Admx of the estate of John R. Stewart Dec'd vs. Southern Railway [fol. 132] Company in the U. S. District Court in and for the Eastern District of Missouri.

This Space For Treasurer's Use Credit Account H. B. Haun, Claim Agt. Draft No. 122

Dated 11-30 1937

them
to / him, the said Mary Stewart, Admx
of the estate of John R. Stewart deceased and A. R. Felsen, Att'y does
hereby release and discharge the
Southern Railway Company, and the
Southern Railway Company......

..... and

mands, actions and rights of action that he now has or may hereafter have by reason of said injuries and accident, and also releases said companies from any obligation or requirement to take or retain him in employment or service in any position or capacity whatever.

Given under my hand and seal, this 30th day of November, 1937.

(Signed) MARY STEWART,
Admx of the Estate of John (Seal)
R. Stewart Dec'd

Witness (Signed) MRS. WM. HAM,

Witness (Signed) W. H. HAM.

(Signed) ARTHUR R. FELSEN, Atty. (Seal) [fol. 133] "Place Endorsements On Other Side of Voucher.

Received November 30th 1937, of the Southern Railway Company,

Five Thousand One Hundred Fifty and 00/100 Dollars

in full for above account, in consideration of which I release and discharge said companies as above specified.

(Signed) MARY STEWART, (Seal) Admx of the estate of John R. Stewart Dec'd

(Signed) ARTHUR R. FELSEN, (Seal)

Witness (Signed) Mrs. W. Ham.

Witness (Signed) W. H. Ham.

Note.—The above receipt must be dated and signed by the payee of this Voucher; or, if signed by another, the authority for so doing must in all cases accompany the Voucher. The signature must be technically correct. Changes or erasures will invalidate the Voucher."

Defendant's Exhibit No. 3

"No Protest Southern Railway Company No. 122

November 30th, 1937.

At Sight Pay To The Order Of

Mary Stewart Admx of the estate of John R. Stewart Dec'd and A. R. Felsen, Att'y

Five Thousand One Hundred Fifty and 00/100 Dollars \$5150.00

In Full Settlement For All Claims and Damages Incident To fatal injuries sustained by John R. Stewart at or near [fol. 134] East St. Louis, Illinois, on or about February 12th, 1937, and for all results attending or following said injuries and in full settlement of Suit styled Mary Stewart Admx vs. Southern Ry Co U. S. District Court of St. Louis, Mo.

To:
) (Signed) H. B. HAUN,
Treasurer, Southern
)
Railway Company,)
Claim Agent Southern
Washington, D. C.)
Railway Company"

(Defendant's Exhibit No. 3 bears the following endorsements on the back)

"(Signed) Mary Stewart, Admx of Estate of John R. Stewart, dec'd.

A. R. Felsen, Atty."

Mr. Davis: May it please the Court, I desire to offer in evidence authenticated copies of the record of an order of the Probate Court and a petition of Mary Stewart for setting aside order authorizing settlement, and petition of the Southern Railway to intervene, and the order of the Probate Court with respect to the compromise, and the petition of Mary Stewart to set aside order of compromise, and the petition of Southern Railway to intervene, and the order of the Court on Mary Stewart's petition to set aside.

They are all pleaded and it is an authenticated copy of them.

Mr. Hay: We object to the introduction of these records, [fol. 135] Your Honor, as having no proper place in this case, as not bearing upon any issue to be tried in this particular proceeding, and I would like to be heard on that if Your Honor has any question about it, and perhaps inasmuch as there will be some discussion of it you might like to hear it without the hearing of the jury.

The Court: All right.

Announce a recess.

(Recess, twenty-five minutes.)

The Court: The objection is sustained.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

[fol. 136] Mr. Davis: (Addressing the witness) I think that is all, Mr. Wiechert, just at present; unless they want Mr. Reinhardt, will you come up?

Mr. Hay: Wait a moment. I want to cross examine Mr. Wiechert.

Let me have those documents.

Cross-Examination.

By Mr. Hay:

Q. Mr. Wiechert, I believe you say that you are attorney for the Southern Railroad Company.

A. Yes, sir.

Q. You were at the time the transaction was had about which you have testified here? A. Yes, sir.

Q. And you were representing the Southern Railway Company in that transaction, were you?

A. Yes, sir. It is the Southern Railway Company.

Q. The Southern Railway? A. Yes, sir.

Q. That is what I mean. You were representing that company? A. Yes, sir.

Q. Was there any other lawyer at the time representing

that Southern Railway Company?

A. Our whole firm represents the Southern Railway Company.

Q. Yes. How many are there in your firm?

A. We have four in the firm and two associates. [fol. 137] Q. All of you represent the company?

A. Southern Railway Company, yes, sir.

Q. And did in this transaction?

A. Yes, sir.

Q. This transaction occurred in your office, did it not?

A. That is part of it.

Q. That is the part of the transaction that you testified to here occurred there in your office, or over in court following the conference in your office? A. Yes, sir.

Q. Had you ever met Mrs. Stewart before she came to

your office? A. No. sir.

Q. What time of the day was it when she came?

A. I would say it was about 9:30, 10:00 o'clock, somewhere along there.

Q. Who came with her?

A. Her daughter, Mrs. Hamm, and her son-in-law, Mr. Hamm.

Q. Any lawyer? A. No, sir.

Q. Just her daughter, Mrs. Hamm, and Mr. Hamm?

A. Yes, sir.

Q. They came there about 9:30? A. Yes, sir.

Q. What time was the transaction in your offices completed? A. Shortly before 12:00.

Q. I see. What took place in your office?

[fol. 138] Mr. Davis: Now, Your Honor, this has nothing to do with the orderly procedure as they say, and this has nothing to do with the transaction—

The Court: Well, I don't know. I don't know whether it does or not as yet.

Mr. Hay: I will withdraw that part a moment. I will withdraw that part a moment and ask this question:

Q. This document numbered, or Defendant's Exhibit No. 1, the document Defendant's Exhibit No. 1, which is in the nature of a petition to the Probate Court over at Belleville, St. Clair County, I believe you say was signed by Mrs. Stewart? A. Yes, sir.

Q. Was that signed in your office?

- A. No, sir. It was signed in the Probate Court Clerk's office.
 - Q. Was anything signed by her in your office?

A. No, sir.

Q. Who participated in the conference in your office?

A. Mr. Haun was in the office awhile, and Mr. A. R. Felsen, an attorney at East St. Louis.

Q. Well, who is Mr. A. R. Felsen in this transaction?

A. He is an attorney that has offices in the same build-[fol. 139] ing that we do.

Q. On the same floor?

A. No, sir, not on the same floor.

Q. But in the same building!

A. In the same building.

Q. Is he the gentleman that I note from this exhibit in the release is referred to as attorney for the administratrix? A. Yes, sir.

Q. Well, he did not come there with her, did he?

A. He did not.

Q. How did he get into the matter?

Mr. Davis: Well, Your Honor, it seems to me that this is going beyond any examination that we had.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. How did he get into the matter?

- A. I called him to the office after Mrs. Hamm, or Mrs. Stewart agreed that he should represent her in the Probate Court.
 - Q. Did she know Mr. Felsen?
 - A. I think she did. She had met him before.
 - Q. Had she ever employed him before that?
 - A. Not that I know of.

[fol. 140] Q. Well, you knew that she did not employ him before that, didn't you?

A. I think that is true.

Q. You knew that she had employed Mr. Noell, didn't you? A. Yes.

Q. Who called Mr. Felsen?

- A. That particular morning I called him.
- Q. Who suggested that Mr. Felsen be called?

A. I did that morning.

Q. Whom were you representing?

A. I was representing the Southern Railway Company.

Q. And when you called Mr. Felsen to act as attorney for Mrs. Stewart, whom were you representing?

A. I was representing the Southern Railway Company, but it was by the consent of Mrs. Stewart that Mr. Felsen be called.

Q. And you suggested that Mr. Felsen be called, did you? A. Yes, sir.

Q. And that was during the time that you were negotiating a settlement with Mr. Stewart, with Mrs. Stewart in a case against the Southern Railroad Company?

A. I would not call it negotiating a settlement because she had agreed on the amount, and it was just a question of putting through the settlement and securing the release.

Q. When had she agreed on the amount?

[fol. 141] A. Prior to that time.

Q. Where? A. Her son-in-law-

Q. Now, just a moment. You told us a while ago that you never saw this lady but once, and that was the first time you saw her was in your office?

A. Yes, sir, on November 30th.

Q. Now, when did you learn from her that she had agreed on a settlement? A. That day.

Q. She came in on that day, and that was the first you

knew about it?

A. That is from her; that is not—

Q. From her?

A. That is not the first I knew.

Q. But you first learned from Mr. Hamm, did you not?

A. Well, I learned it from Mr. Campbell, who had talked to Mr. Hamm some days previous to that time.

Q. Do you know how Mr. Campbell happened to get in touch with Mr. Hamm?

A. Yes, Mr. Hamm came to Mr. Campbell's office.

Q. Do you know who sent him there?

A. I think Mr. Howell.

Q. And who was Mr. Howell?

A. He was an attorney for the Terminal Railroad Association of St. Louis.

Q. And whom did Mr. Hamm work for?

A. The Terminal Railroad Association of St. Louis, so I am informed.

[fol. 142] Q. You learned that in the attempt to get a settlement out of this woman Mr. Howell, the attorney for the Terminal Railroad, had called her son-in-law, Henry Hamm, into his office to talk to him about the case, didn't you?

Mr. Davis: Now, we object to that question there in its entirety.

The Court: The objection is sustained as to the form of the question.

Mr. Hay: Very well.

Q. Did you learn, I believe you stated that Mr. Howell had sent Mr. Hamm over? A. Yes, sir.

Q. And he came to see Mr. Campbell?

A. Yes.

Q. And that Mr. Campbell then got in touch with you?

Well, his office and my office are right alongside of each other.

Well, Mr. Campbell represents the Southern Rail-Q.

road also? A. Oh, yes.

Q. He is one of your partners?

He is one of my partners, yes, sir. A.

And the first you knew about it then was when Mr. Hamm, the son-in-law of Mrs. Stewart, came to you after, [fol. 143] as you had learned he had gone to see Mr. Howell, that is right, isn't it?

A. The first I knew about it, when Mr. Campbell told

me Mr. Hamm had come to his office.

Q. Had come to his office? A. Yes, sir.

Q. What had transpired, of course, between Mr. Howell and Mr. Hamm, you do not know?

A. No, sir, I do not.

Q. But he came. Then, the next you knew, was when Mrs. Stewart was brought into the office?

A. Yes, sir.
Q. And you say the settlement had been agreed upon?

A. So I understood.

Q. Well, when did you understand that?

A. Previous to the time, after Mr. Hamm's conversation with Mr. Campbell.

Q. Yes. So that when she got there that morning you understood the settlement had been agreed upon?

A. Yes.

Q. And all that was to be done was to carry out the formalities of it? A. Yes.

And you started into the conference at what time?

A. About, I would say 9:30, 10:00 o'clock.

Q. And broke up when? A. Shortly before 12:00.

[fol. 144] Q. What were you doing all that time?

A. When Mrs. Stewart, and the Mr. and Mrs. Hamm came in the office, we sat down and discussed this, and there was a question of attorney fees.

I told her that the—we would see that she would be protected from the payment of any attorney fees to Mr. Noell, that we wanted to see her get the five thousand dollars free and clear to her as administratrix."

She wanted that matter with reference to the attorney fees in writing, and I told her that we would not put it in writing, that she would have to take our word as to that.

Then I explained to her that in putting through this settlement and release that we wanted the approval of the Probate Court, and I had the papers prepared, had prepared them beforehand, and I explained to her that we wanted her, we wanted an attorney to represent her in the Probate Court, and suggested that Mr. Felsen appear.

In the meantime I had called Mr. Haun in the office. His office is just adjacent to ours, and we had gone over this matter of the attorney fees and so forth, and settled that, then called Mr. Felsen into the office and explained the whole thing to him, and he asked Mrs. Stewart and Mr. and [fol. 145] Mrs. Hamm whether that was satisfactory, and they said yes.

He wanted to see the petition and order that was prepared, and the release, and he sat down and read those, and then he read them aloud to all of us there in the room so that Mrs. Stewart would know exactly what she had to sign, even read the order that I had prepared for the Probate Court, and after we got through with that, well, Mrs. Stewart took the papers and she read every paper, not out loud, but she took each paper individually and read them, and we told her that we would have to go to Belleville, and we then went to Belleville to the Probate Court.

Q. Now, let me ask you this: Did Mr. Felsen at any time have any talk with Mrs. Stewart not in your presence?

A. Not that I know of.

Q. Did he ever, so far as you know, have any talk with her with respect to the merits of this settlement?

A. Not that I know of.

Q. In other words, Mr. Felsen was employed upon your suggestion and called by you into this case, a lawyer selected by you for her, that is true, isn't it?

A. With the consent of Mrs. Stewart.

Q. Oh, yes, certainly.

[fol. 146] A. If she had objected to Mr. Felsen we would have called any lawyer that she suggested.

Q. So far as you knew, did she up to the time you prepared this settlement for her as representative of the

Southern Railroad Company, have any discussion with any counsel not selected by you?

A. Not that I know of.

Mr. Hay: That is all.

Mr. Davis: That is all for the present.

LEONARD O. REINHARDT, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination.

By Mr. Davis:

Q. Please state your name.

A. Leonard O. Reinhardt.

Q. And where do you live?

A. St. Clair County, East St. Louis, Illinois.

Q. And what is your business?

A. Clerk of the Probate Court, St. Clair County, Illinois.

Q. I will get you to look at Defendant's Exhibit 4, and

just state what that is.

A. It is an order of the Probate Court, signed by the Judge, in the matter of the Estate of John R. Stewart, deceased.

[fol. 147] (The said document was marked by the reporter as Defendant's Exhibit No. 4.)

Q. Now, I will get you to look at Defendant's Exhibit

No. 5, and state what that is, just generally?

A. It is a petition for settlement, setting aside order authorizing settlement in the matter of the Estate of John R. Stewart, deceased, filed in our court on December 10, 1937.

(The said document was marked by the reporter as Defendant's Exhibit No. 5.)

Q. And when was this Defendant's Exhibit 4 filed in court? A. Filed November 30, 1937.

Q. I will get you to look at Defendant's Exhibit 6, and

state what that is.

A. That is a docket of the Probate Court of St. Clair County, Illinois.

(The said document was marked by the reporter as Defendant's Exhibit No. 6.)

Q. Docket of the Probate Court of St. Clair County, Illinois. A. No. B 768.

Q. And what estate does that represent, or relate to?

A. To the estate of John R. Stewart, deceased.

Q. Now, I will get you to state what Defendant's Exhibit No. 7 is.

A. It is a petition filed in the matter of the Estate of [fol. 148] John R. Stewart, deceased, filed January 31, 1938.

(The said document was marked by the reporter as Defendants' Exhibit No. 7.)

Mr. Davis: Now, may it please the Court, we offer Defendant's—this is already in evidence, Your Honor.

Q. I will ask you if you will look at Defendant's Exhibit No. 1, if that is your signature.

A. Yes, sir.

Q. To the affidavit to that petition? A. Yes, sir.

Q. And did Mary Stewart swear to that before you?

A. Yes, sir.

Q. And where did she sign it, if you know?

A. At the counter in the Probate Clerk's office, St. Clair County, Belleville, Illinois.

Q. And where is that located?

A. Belleville, Illinois.

Q. So she signed this Exhibit No. 1, Defendant's Exhibit No. 1 in Belleville, Illinois? A. Yes, sir.

Q. And before you there? A. Yes, sir.

Q. I will ask you what Defendant's Exhibit No. 8 is.

A. It is a letter from Charles P. Noell of St. Louis, Missouri, stating that he is enclosing a petition to be filed in [fol. 149] our court, and this was received on December 10, 1937.

(The said document was marked by the reporter as Defendant's Exhibit No. 8.)

Q. And I will ask you what Defendant's Exhibit No. 9 is.

A. That is an affidavit by Deputy May that he mailed a notice to Mr. Noell to the effect that the order had been entered in our court on the 30th day of November, 1937.

(The said document was marked by the reporter as Defendant's Exhibit 9.)

Q. As Clerk of the Court of St. Clair County, Illinois, are you in charge of the records of the Court?

A. Yes, sir.

Q. And of these exhibits, from Exhibit 4 to Exhibit 9, inclusive?

A. If those were the papers you showed me, I am custodian of those records, yes, sir.

Q. You are custodian of those records.

Mr. Davis: Now, if it please the Court, I offer in evidence Defendant's Exhibit 4, Defendant's Exhibit 5, Defendant's Exhibit 6, Defendant's Exhibit 7 and Defendant's Exhibit 8 and Defendant's Exhibit 9.

Mr. Hay: Pardon me. You are not including in that the petition?

[fol. 150] Mr. Davis: No.

Mr. Hay: That has already been offered.

The plaintiff objects to the introduction and reception into evidence of these exhibits for the reason that they are not competent or material or relevant to the issue being tried before this court, which has to do with the validity of the release itself, that being drawn in question under allegations of fraud and duress.

There is no issue here as to the question of authority of the administratrix to make a settlement, but the issue is as to the validity of this release which was executed.

The Court: The objection is sustained.

Mr. Sheppard: I understand it is not necessary to save exceptions under the new rules.

The Court: No. Exceptions save themselves.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

(By stipulation, photostatic copies of the documents heretofore identified as Defendant's Exhibits Nos. 4, 5, 6, 7, 8, and 9, respectively, are here inserted.)

[fol. 151] (Defendant's Exhibit 4.)

6/9/39 C. P. A.

Order.

In the Probate Court of St. Clair County, Illinois.

In the Matter of

The Estate of John R. Stewart, Deceased.

And now on this 30th day of November, A. D. 1937, being one of the judicial days of the November Term of this court, comes Mary Stewart, widow of John R. Stewart, deceased, and administratrix of his estate, and files her verified petition praying that she may be authorized as such administratrix to settle all claims and demands that she may have as such administratrix against the Southern Railway Company on account of the fatal injuries received by said deceased on February 12, 1937, in his employment as a switchman for Southern Railway Company, from which injuries said deceased died on the 14th day of February, 1937, and that at the time of said injuries said deceased and said Southern Railway Company were engaged in interstate commerce, and that said Southern Railway Company has offered and agreed, provided a full and complete release can be obtained, to pay to said administratrix the sum of Five Thousand Dollars (\$5,-000.00), in full settlement of all claims and demands on account of said fatal injuries to said deceased.

Said petitioner further represents that one Charles P. Noell, whose business address is 1502 Telephone Building, in the city of St. Louis, Missouri, claims to have a lien for attorney fees on the amount which petitioner receives in settlement of said claim, and that any such lien which the said Charles P. Noell may claim is null and void and of no force and effect, and that said Charles P. Noell is not [fol. 152] entitled to any attorney fees or any lien for attorney fees on said settlement, and further prays that an order be entered by the Court herein directing that said Charles P. Noell be notified to appear in this cause by a

short day to be fixed by the Court, to assert and present his claim, if any, for attorney fees or lien for attorney fees against said administratrix arising out of said settlement.

And the Court having examined said petition and having heard evidence in support thereof, and being fully advised in the premises, doth find that the Court has jurisdiction of the subject matter and of the parties to this proceeding; that the payment of the sum of Five Thousand Dollars (\$5,000.00) to said administratrix of said estate in full settlement of all claims and demands, actions and causes of action accrued to her as such administratrix by reason of the fatal injuries to said deceased, John R. Stewart, received at the time and place aforesaid, will be the payment under all circumstances of a reasonable, just and proper amount therefor, and that it is for the best interests of said estate and all persons interested therein that said settlement be made, and upon the payment of the same that a full release be given to the said Southern Railway Company.

It Is, Therefore, Ordered And Adjuded by the Court that said settlement be and the same is hereby approved, and that upon receipt of the sum of Five Thousand Dollars (\$5,000.00) the said administratrix of the estate of said deceased be and she is hereby authorized to settle said daim and to execute and deliver to the said Southern Railway Company a full and complete release settling, satisfying and discharging all claims, demands, actions and [fol. 153] causes of action of every kind, nature and description which she, the said administratrix of said estate, has against said Southern Railway Company on account of said fatal injuries to said deceased as aforesaid.

It Is Further Ordered And Adjudged that the claim of one Charles P. Noell for attorney fees or lien for attorney fees against said administratrix on account of said settlement be and the same is set for hearing at 9:30 A. M. on the 10th day of December, 1937, at which time the said Charles P. Noell shall appear and present his claim for much attorney fees or lien for attorney fees.

It Is Further Ordered And Adjudged that the Clerk of this court shall immediately send to the said Charles P. Noell addressed to him at 1502 Telephone Building, St. Louis, Missouri, a certified copy of this order, by registered United States mail, which shall constitute notice to the said Charles P. Noell of the hearing before this Court of his claim for attorney fees or lien for attorney fees.

It Is Further Ordered And Adjudged that the administratrix make no distribution of said amount so received in settlement from Southern Railway Company until the further order of this court.

PAUL H. REIS,

Judge.

(Endorsed on Back): 62-531 Estate of John R. Steward, Dec'd. Order of Settlement. Filed Nov. 30, 1937, L. O. Reinhardt, Pr. bate Clerk.

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DEFENDANT'S EXHIBIT 5.

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Deceased.

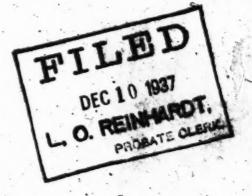
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PETITION FOR SETTING ASIDE ORDER AUTHORIZING SETTLEMENT. 6

DOCKET OF THE PROBATE COURT

OF ST. CLAIR COUNTY, ILLINOIS

NoB-768

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(Defendant's Exhibit 7.)

6/9/39 C. P. A.

(Application of Southern Railway Company for leave to intervene at hearing on Motion of Mary Stewart, Administratrix, etc., to set aside Order of Settlement.)

In the Probate Court of the County of St. Clair, State of Illinois.

In the Matter of

The Estate of John R. Stewart, Deceased:

And now comes the Southern Railway Company, a corporation, by Phillip G. Listeman, its attorney, and respectfully moves the Court that it may be permitted to intervene and become a party to the hearing on the motion by Mary Stewart, Administratrix of said estate, to set aside order of this Court entered on November 30, 1937, approving settlement of her suit against the Southern Railway Company, and authorizing the dismissal of the same in the District Court of the United States for the Eastern District of Missouri, and in support of this motion Southern Railway Company says:

That said motion involves the question of whether or not an order of this Court authorizing and directing said Mary Stewart, as Administratrix as aforesaid, to settle her suit against the Southern Railway Company on account of fatal injuries received by her husband and intestate while employed by the Southern Railway Company, and the dismissal of the suit brought by her as administratrix against the Southern Railway Company, in the District Court of the United States for the Eastern District of Missouri, to recover damages on account of the same, be set aside.

Southern Railway Company avers that it has paid the amount of said settlement and taken a release from the said Mary Stewart, Administratrix as aforesaid, and has, in all respects, complied with the provisions of the order [fol. 159] of this Court on November 30, 1937, aforesaid.

Southern Railway Company further says that the hearing, order and judgment on said motion may affect an interest or title which it has, namely, its interest or title

in the settlement made as aforesaid, the release executed by the said Mary Stewart, as Administratrix as aforesaid, in accordance with the said order of this Court, and the payment of the money by the Southern Railway Company to her.

Southern Railway Company, therefore, represents under Section 25 of the Civil Practice Act of the State of Illinois that it has an interest or title, as above set forth, which the judgment and order of this Court on said motion may affect, and it, therefore, asks under said Section 25 of the Civil Practice Act for permission of this Court to intervene upon the hearing of this motion, and to be made a party thereto.

All of which is respectfully submitted.

SOUTHERN RAILWAY COMPANY, By Philip G. Listeman.

[fol. 160] State of Illinois, County of St. Clair—ss.:

H. B. Haun, being first duly sworn on his oath, deposes and says that he is Claim Agent of the Southern Railway Company, having jurisdiction in the County of St. Clair in the State of Illinois, and other counties in Illinois, Indiana and Missouri; that he has full knowledge of the facts set forth in the foregoing petition and that he is authorized to make this affidavit. That he has read over the above and foregoing petition and is fully acquainted with the facts set forth therein, and that the facts set forth therein are true and correct as therein stated.

H. B. HAUN.

Subscribed and sworn to before me this 31 day of January, A. D. 1938.

L. O. REINHARDT,
Probate Clerk.
By E. C. Schobert, Dpy.

(Endorsed on Back): Estate of John R. Stewart. Petition of Intervention of Southern Railway Co. Filed Jan. 31, 1938, L. O. Reinhardt, Probate Clerk.

[fol. 162]

(Defendant's Exhibit 8.)

6/9/39 C. P. A

CHestnut 52838

Charles P. Noell
Attorney and Counselor at Law
Suite 1502 Telephone Bldg.

St. Louis

December 8, 1937.

Leonard O. Reinhardt, Probate Clerk, Belleville, Illinois.

Dear Sir:

Enclosed please find Petition, which you will kindly file in the matter of the Estate of John R. Stewart.

Please call this to the attention of Judge Reis, and oblige.

Very truly yours,

CHARLES P. NOELL.

CPN:JG

(Endorsed on Back): Filed Dec. 10, 1937, L. O. Reinhardt.

[fol. 164]

(Defendant's Exhibit 9.)

6/9/39 C. P. A.

In the Probate Court of the County of St. Clair, in the State of Illinois.

In the Matter of

The Estate of John R. Stewart, deceased.

E. C. Schobert, being duly sworn, upon his oath deposes and says that he is and for more than one year last past has been the duly appointed, acting and qualified Deputy Clerk of the Probate Court of the County of St. Clair in the State of Illinois; that on the 30th day of November, A. D. 1937, as such Deputy Clerk as aforesaid, and acting for and on behalf of the Probate Clerk of said County and as his deputy, as aforesaid, in compliance with the order of this Court on that day entered in the above

entitled cause, he did send by United States mail to Charles P. Noell, at 1502 Telephone Building, St. Louis, Missouri, a certified copy of the order of said Court entered in said cause on the said 30th day of November, A. D. 1937. That said certified copy of said order was placed by this affiant in an envelope, which was duly sealed and then addressed to the said Charles P. Noell at 1502 Telephone Building, St. Louis, Missouri, and sufficient amount of United States postage was placed on the same for the sending of the same through the mail as a registered letter, with a return receipt requested; and the said envelope so addressed and stamped, as aforesaid, containing said certified copy of said order of this Court, as aforesaid, was deposited in the United States mail by this affiant on the said 30th day of November, A. D. 1937.

[fol. 165] Affiant further says that afterwards he received the return receipt for such registered letter, which return receipt so received by him through the United States mail is attached hereto and made a part of this affidavit.

And further this affiant saith not.

E. C. SCHOBERT.

Subscribed and sworn to by the said E. C. Schobert this 10th day of December, A. D. 1937.

L. O. REINHARDT, Probate Clerk.

(Seal)

(Endorsed on back): Estate of John R. Stewart, dec'd. Affidavit of mailing of Notice to Chas. P. Noell. Filed Dec. 10, 1937, L. O. Reinhardt, Probate Clerk.

[fol. 167] Mr. Davis: I think that is all.

Mr. Hay: That is all. You are still Clerk, are you?

A. Yes, sir.

Mr. Hay: That is all.

Mr. Davis: We rest, may it please the Court, at the [fol. 168] present time.

The Court! You what?

Mr. Davis: In the orderly procedure, we rest.

The Court: You rest now?

Mr. Davis: Yes. Of course, that does not preclude us, as I understand it, from introducing further evidence.

(Here ensued a colloquy between Court and counsel, out of the hearing of the jury.)

Mr. Lucas: It is stipulated by and between counsel for plaintiff and counsel for defendant that the exhibits which were produced in court by the Clerk of the Probate Court of St. Clair County, Illinois, with the exception of Exhibit 1 for which a receipt will be given to him, may be withdrawn and taken by him to the court.

Mr. Hay: That is all right.

Mr. Lucas: That is agreeable to both parties.

It is further stipulated that there is no objection to substituting copies of the originals of these exhibits, defendant's Exhibits.

Mr. Davis: Defendant's Exhibits 1, 4, 5, 6, 7, 8 and 9. They are in here anyway with the exception of one of them.

Mr. Lucas: All exhibits, defendant's exhibits 2 and 3? [fol. 169] Mr. Hay: That is all right.

The Court: Will counsel step up to the bench a minute?

(Here ensued a colloquy between Court and counsel off the record.)

Mr. Shappard: We promised Your Honor we would show the earnings of the decedent last year.

We will comply with that by putting a man on now who knows. We were about to forget that.

C. O. Young, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination.

By Mr. Davis:

Q. Will you please state your name?

A. C. O. Young.

Q. Where do you live? A. 2112 Maryland Avenue, Louisville, Kentucky.

Q: And what is your business now?

A. Chief Clerk to the Superintendent of the Southern Railway on the St. Louis and Louisville Division.

Q. What was your business on February 14, 1937?

A. I was timekeeper.

Q. And how long before that had you been timekeeper!

[fol. 170] A. I had been timekeeper since 1932.

Q. Now, have you any records with respect to John R. Stewart, and the hours he worked and the money he made during that time?

A. I have the record, of the amount that he made in

the year 1936.

Q. In the year 1936? A. Yes, sir.

Q. And up to the time that he died? A. Yes, sir.

Q. All right. Now, let us see those records.

(Witness produces certain records.)

Q. Can you look at those records and tell me how many days John R. Stewart worked during the month of January, 1936, and what he made?

A. No, sir. I can tell you what he made, but the pay-

rolls do not show the number of days he worked.

Q. Can you tell what he made during that month?

A. What month was that?

Q. January, 1936.

A. No. I have his earnings for the period of February, 1936, starting the first period of February up to the time of the accident.

Q. Now, take February, how much did he earn in that

time?

A. \$77.67, wait a minute, \$77.17.

Q. That was during the whole month of February, 1936!

A. That is right.

Q. Now, how much, \$77.00 what? A. \$77.17. [fol. 171] Q. Now, how much did he earn during the month of March, 1936?

A. During the first period of March he earned \$76.34, and the second period of March he earned \$87.30.

Q. And what did he earn during April, 1936?

A. April, 1936, for the first period April, 1936 he earned \$72.93, and the second period of April, \$58.25.

Q. How much did he earn during the month of May,

A. The first period of May he earned \$74.07, the second

period of May, \$73.97.

O. How much did he earn during June, 1936?

A. June, the first period he earned \$80.49, and the second period he earned \$55.98.

Q. And how much did he earn during the month of July?

A. The first period of July he earned \$50.08, and the second period of July he earned \$91.04.

Q. How much did he earn during August?

A. The first period of August he earned \$75.22, and the second period of August he did not work, no earnings.

Q. You have nothing in your records showing why he

did not work?

A. No, sir, I do not know why.

Q. How much in September?

A. In the first period, \$33.10, and in the second period, \$60.20.

Q. And how much during October?

A. The first period of October he earned \$67.13; in the [fol. 172] second period of October he earned \$74.27.

Q. And the month of November?

A. In the first period of November, he earned \$55.76, and the second period of November, he earned \$6.62.

Q. \$6.62? A. Yes, sir.

Q. How much did he earn during December?

A. The first period of December he earned \$46.65, and the second period he earned \$79.23.

Q. How much did he earn during the month—was that

A. That was December, yes, sir.

Q. And how much during January?

A. During the first period of January, 1937, he earned \$80.09, and the second period of January he earned \$55.87, and \$6.83, that will give you the total of that second period \$62.70.

Q. And why that extra, overtime?

A. Well, no, in the second period of January, 1937, on account of the flood conditions we had down in Louisville, there was a lot of the time [—] did not get in, and we made two sets of payrolls.

Q. That was in Louisville! A. Yes, sir.

Q. Not in East St. Louis? A. No, sir.

Q. How much did he earn in February, 1937?

A. \$24.24.

[fol. 173] Q. And how much did he get a day?

A. An eight-hour day was \$6.62.

Q. \$6.62 a day! A. Yes, sir.

Q. And what was the average during the year before!
A. He averaged—

Q. Before his death? A. \$119.94.

Q. \$119.94? A. Yes, sir.

Q. The year before his death?

A. Yes, sir. That was from February to January, inclusive, 1937.

Mr. Davis: I think that is all,

Cross-Examination.

By Mr. Haye

Q. Do you have the records for the previous year!

A. For 1936?

Q. 1935. A. No, sir, I have not.

Q. You have no record except for the year 1936?

A. That is right.

Q. I see.

The Court: You have those records, haven't you, but you haven't brought them here?

A. That is right.

Q. I note that in each half month for the whole year before his death he worked. If I followed you correctly, he worked in each of the half months and was paid for [fol. 174] each of the half months except for the second half of August.

A. I believe that is the only one that I said he did not work in, but he did not work in the first period of Febru-

ary, 4936.

Q. The first period of February?

A. But he received two checks for the second period of February, 1936.

Q. I see. But all the rest of the time he worked in each of the half months?

A. Yes.

Mr. Hay: That is all.

Mr. Davis: That is all.

Mr. Davis: I think we rest.

Mr. Sheppard? We really rest now, don't we?

Mr. Davis: Yes, except for the doctor.

The Court: You rest now except for the doctor's testimony tomorrow morning, which I will permit you to introduce out of turn.

Mr. Davis: Yes.

Plaintiff's Case in Rebuttal.

And thereupon the plaintiff, to further sustain the issues in her behalf, offered the following evidence in rebuttal:

[fol. 175] Mrs. Mary Stewart, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further on behalf of the plaintiff, in rebuttal, as follows:

Direct Examination.

By Mr. Hay:

Q. Mrs. Stewart, you have testified heretofore that Mr. Stewart, your husband, died on February 14th?

A. Yes, sir.

Q. 19371 A. Correct.

Q. Following that time you engaged counsel for the purpose of bringing a suit against the company, did you not?

The Court: He means you employed a lawyer, I think.

Q. You employed a lawyer to bring the suit?

A. Before my husband died?

Q. No. I say after your husband's death.

A. Oh, after, yes, sir.

Q. Do you remember when it was that you hired a law-

A. The 16th of April, I think it was.

Q. And whom did you employ? A. Charles P. Noell.

Q. I see. Following your employment of Mr. Noell you were appointed administratrix of the estate as you have testified heretofore, were you not?

A. Yes, sir.

[fol. 176] Q. And the suit was filed here in the City of St. Louis?

A. Yes, sir.

Q. Now, before your employment of any lawyer had any representative of the railroad company come to you to talk a settlement of the case?

A. Well-

Mr. Davis: Your Honor, we object to any such evidence because this is a collateral attack on the judgment or order of the Probate Court of St. Clair County of Illinois; that evidence cannot be introduced relative to fraud or duress until a suit to set aside an orderly judgment of the Probate Court in a direct proceedings has been made.

In this case plaintiff filed such proceeding and it was denied.

We object again on the ground that fraud or duress is limited to the time of the execution of the release and certainly duress is, because time for reflection does not need duress, and certainly anything that happened before—

The Court: Don't argue, but make your objection.

Mr. Davis: I am making it. I do not want to do that.

Then, we object to any testimony on the ground that she ratified the settlement by a petition filed in the Probate [fol. 177] Court after the agreement to the settlement in the office of Kramer, Campbell, Costello & Wiechert, she ratified it afterwards, after she got away from them by accepting and cashing the draft.

We object again because you cannot show fraud or duress in the execution of the release where there is a valid order or judgment of a court, and where the fraud or duress itself does not relate to the time of the execution of the release.

We object on the sixth ground, to the signing of the release after the Probate order, after the Probate Court order, that that was a ratification of it and no fraud or duress is admissible after the order entered because she herself petitioned the Probate Court to execute the release.

The Court: The objection is overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

The Court: Proceed.

Mr. Hay: Will you read the question, please?

(Question read.)

Mr. Davis: May it please the Court, without repeating them, because we do not want to do that, may the same objections run to all of her testimony?

[fol. 178] The Court: The objection may run to all the testimony upon this point.

Mr. Davis: Yes, sir.

The Court: And of course, the objection will be overruled.

Mr. Davis: Yes, sir.

Q. Now, do you understand the question now, Mrs. Stewart? A. Did any lawyer come to me?

Q. Did anyone representing the Southern Railway

Company come to you?

A. Oh, Mr. Felsen came with a Mrs. Pouch. He was taking care of her case.

Q. But this lawyer, he was not representing the South-

ern Railway Company, was he?

A. Well, no, but he was taking care of her case for her. Her husband had gotten killed.

Q. I am not referring to the visit of some other lawyer.

A. Well, that is the only lawyer that came there.

Q. What I am getting at, did any representative, claim agent or other of the Southern Railway Company come to see you about a settlement? A. Oh, Mr. Haun came.

Q. Is this the gentleman sitting over here?

A. Yes, sir.

[fol. 179] Q. Stand up, will you please, sir &

(Mr. Haun stands up, as requested.)

Q. Is that the man that came to see you?

A. He came once, he said to get acquainted.

Q. Now, when was that?

A. I do not just recall when it was, but it was along early in the spring.

Q. That was before you had employed Mr. Noell?

A. Oh, yes, sir; and then he came again and told me that there would be a man there to tell me that they would offer me a thousand dollars.

Q. I see. Well, did somebody later come?

A. Later on there was a man came and I was not home, and then he called again.

Q. Do you know who that was?

A. His name was Reno, I found out later, but at that time he would not discuss his name. He came about 9:30 or 10:00 o'clock at night, when there was no one there but my daughter and I, and I told him that I did not want to talk to him because he would not tell me, I thought a man that was ashamed of his name—

The Court: Just a minute. I would like to ask a question.

A. I-

The Court: Wait a minute. I want to ask you a ques-[fol. 180] tion. What statement did he make to you about his reason for being there?

A. Well, he said he was a friend of my husband, and he would like to come just to see what he could do to help me out in our—

Q. Did he state that he was connected with the Southern Railway?

A. No. He said he was working for a refinancing company, and he could not tell just who he was, or what.

The Court: Oh, yes.

Q. I see. He did not claim to be working for the rail-road company?

A. No, he was not supposed to be working.

Q. That is this Mr. Reno? A. Yes.

Mr. Hay: Will you stand up, please, sir (addressing a man in the audience who later was identified as Mr. Reno)!

(A man in the audience addressed as heretofore, stood up as requested.)

Q. Is that the man?

A. He came once before, but he did not want to come in, because he did not want anyone to know who he was.

O. And he claimed to be a friend of your husband?

A. Yes.

[fol. 181] Q. Now, was this before you had employed Mr. Noell or after? A. Well, he came before.

Q. I see. A. And then he came again after.

Q. Afterwards? A. Yes, sir. Q All right. Now, did anybody else come to see you before you had employed Mr. Noell, I mean representing the Southern Railroad Company or claiming to represent them?

Well, this Mr. Reno was telling me that a man in Missouri he would like to have me talk to him, a Mr. Stillwell, and he would like for him to take the case.

Q. Did you later find out who Mr. Stillwell was?

A. Well, I later on did, yes.

That is some man up in North Missouri?

Some place, Hannibal, I believe.

By The Court:

Q. Do you mean Walter Stillwell, a lawyer at Hannibal, Missouri?

A. Walter Stillwell, yes, sir.

Q. Now, then, what was the next that occurred with respect to any conference about your case? Who came to see you next?

A. I can't just recall who now.

Q. I see. Now, then after Mr. Noell had filed a suit for you, that was in April, was it?

Mr. Noell: Yes.

[fol. 182] Q. In April, 1937, A. Yes, sir.

Q. During that spring did anyone come to see you again after this suit was filed?

A. Mr. Haun came and told me that they would give me two thousand dollars.

Q. And where did he see you then?

A. He was at our place then, at my daughter's place rather. I was staying there.

Q. That was over in East St. Louis?

A. East St. Louis, yes, sir.

Q. I see.

A. I had hardly recovered my nerves from the loss of my husband, and everything, you know, got me all stirred up, and part of the time I was, you know, lying around, not able to do anything.

Q. Now, when was this about?

A. Well, that was in April.

Q. In April?

Mr. Davis: 1937.

Q. 19371

A. In 1937; and then I went to Coulterville, to my nieces.

Q. You went to Coulterville?

A. I went to Coulterville.

Q. Is that in Illinois?

A. That is in Illinois, about fifty miles, I guess, south. [fol. 183] Q. Now, did Mr. Haun come, or anyone else come to see you down there?

A. Mr. Haun came down.

Q. Just tell what occurred when he came at that time.

A. Well, the day that I was starting down there my niece came after me, and while I was getting ready, why Mr. Haun came and he sat there awhile, and we got ready to go, we excused ourselves.

The Court: This was where?

A. That was at my daughter's, Mrs. Hamm's.

The Court: In East St. Louis or in St. Louis?

A. East St. Louis, yes.

The Court: East St. Louis.

Q. All right.

A. And he said he seen I was getting ready to go some place, and he excused himself and left, and we went down to Coulterville, and when we got down there there was a message already came, sent there, that they would like to have me appoint Mr. Felsen to take the case.

Mr. Davis: Wait a second. We object to that unless it is shown that it is the act of somebody connected with the Southern Railway.

The Court: Yes.

Mr. Hay: Yes.

[fol. 184] The Court: You may have an opportunity to show it.

Q. From whom did you get that message?

A. That message came from-

The Court: Who delivered it to you? That is what you want.

Mr. Hay: Yes.

A: Let's see, what was the name of the man?

The Court: Was it a written message?

A. It was a written message.

Q. Well, do you have that?

Mr. Davis: Then we object to it, unless-

Q. Well, do you know, do you have that message?

A. No, I do not have it. I did have it for a while, and then I thought maybe it would not amount to anything, and I just laid it aside.

Q. Now, that had reference to Mr. Felsen's handling of

the case? A. Yes.

Mr. Davis: Now, we object to that.

The Court: Sustained.

Mr. Davis: We object.

The Court: Don't tell anything more about that meseage, because I have ruled that out. You can't testify about that.

[fol. 185] The Witness: Yes. And then in a day or so Mr. Haun came down, that was the 20th, I believe, he came down to talk to me, and it was a dreary rainy day, and he would not talk to me in the house.

Q. That was down at Coulterville?

A. At Coulterville.

Q. At your niece's? A. At my niece's, Mrs. —

Q. Mrs. McKelvey?

A. McKelvey, the lady who sits over here. Q. The lady who sits over here? A. Yes.

Q. All right.

A. He did not want to talk to me in the house, so he wanted me to go out to his car. So I went out to the car. I thought he had something to tell me from Mr. Noell, maybe Mr. Noell had said, so I went out to the car, and he tried to persuade me to take this five thousand dollars.

Q. Five thousand? A. Five thousand dollars.

Mr. Davis: We object to what he persuaded her. Let her tell what she said, and what he said.

The Court: Sustained.

The Witness: Four thousand. I will take that back, four thousand.

The Court: Just tell what he said. Don't say "persuaded".

[fol. 186] Q. Just go on and give as much of the conversation as you can recall.

A. And he told me that was a good sum, and he thought

I should take it.

The Court: What was a good sum?

A. Four thousand dollars, and that he thought I should take it now, or I would never take it because if I did not take the offer while he had it ready, I would not get anything. I said I had a lawyer to take my case, and I had nothing to do with it, and he said he had nothing to do with the lawyer, and he would not negotiate with him now or no time, that I either take the four thousand or nothing. So I did not take it. He said "I would like you to be satisfied." I said, no, I was not satisfied.

Q. How long did he stay there?

A. Well, it appeared to me it was several hours.

Q. And all of that time you were sitting in this car?

A. Yes, sir.

Q. Did he talk to you at any time in the presence of Mrs. McKelvey, your niece? A. No, sir.

Q. And the result was that he offered you, as you have

stated, the four thousand dollars?

A. Four thousand dollars. He said it was all ready, that all I should do would be to take it.

[fol. 187] Q. Now, that was in what month of 19—

A That was the 20th of April.

Q. About the 20th of April, 1937?

A. Yes, about the 20th.

Q. All right. Now, when did you next see anyone in connection with any effort on the part of this company to settle the case?

A. Well, the more I thought about it, you know, and

him, and the way I felt, and the condition, and all.

Mr. Sheppard: We move to strike that out, Your Honor, as not responsive to the question.

The Court: Sustained.

Q. When did you next see Mr. Haun?

A. One of my other nieces took me over to her place that night, and I stayed with her.

The Court: Is that in Coulterville?

A. At Coulterville, just a few blocks, and I was in a very nervous state, stayed all night, and the next morning—

Mr. Davis: We move to strike that out, Your Honor, as still not responsive.

The Court: Sustained.

The Witness: And Mr. Haun came back to see me again.

Q. When was that, the next morning?

A. The next morning, he came back and I was not there, so he came over to my other niece's, Mrs. McMen-[fol. 188] amy, and she told him that I was sick, and he wanted to see me, so she told him no, she did not want me to be disturbed, that I was crying, and she did not want me to be worried, so he came in and spoke, he said, "Mrs. Stewart, since you are feeling so bad I will not detain you. I will be going.", and my niece said, "Well, I wish you would because I do not want you to talk to her" and he left, and I never saw him any more then, I think that is the last time I seen him. Then we went to Salem to see my brother-in-law, Mr. Stewart.

Mr. Davis: Now, wait a second. Were you there!

A. Were I where?

Mr. Davis: At Salem.

A. We went to Salem.

The Court: She said she went to Salem to see her brother-in-law.

Mr. Davis: Oh.

The Witness: We went to Salem to talk to my brother-in-law.

The Court: Salem, Illinois?

A. Salem, Illinois; and then he was telling me about Mr. Reno talking to him.

Mr. Davis: That is hearsay, Your Honor.

The Court: Certainly. Your objection is sustained.

[fol. 189] The Witness: He was talking to him.

The Court: You must not-

Mr. Hay: We will cover that.

The Witness: Excuse me.

The Court: You can't tell what people told you.

The Witness: Oh, yes.

Q. At any rate, you talked the matter over with Mr. Stewart? A. Yes, sir.

Q. I see. Now, did you see Mr. Reno again, or did he

come to see you again after that?

A. No, he never came to see me any more. I went down

to Kentucky, to Hodgenville, Kentucky.

Q. Now, when you got down to Hodgenville, Kentucky, did they send anybody to see you down there?

Mr. Davis: We object to that unless she knows.

The Court: Sustained.

Mr. Hay: We will strike that out.

Q. Did anybody come to see you down there, talk to you about settling the case?

Mr. Davis: We object to it, unless it is connected in any way.

The Court: I do not know whether anybody came yet. I do not know how he can connect it up before he knows something about it. She may answer.

[fol. 190] Q. Did someone come to see you down there?

A. Yes, sir.

Q. Who was it?

A. Well, a time or two when I would be passing along I would see someone peeking around a curtain at a hotel, and then in a few days Mr. Hanley, known as Blond Hanley, came over to my nephew's, Mr. Leahy's, and he told him—

Mr. Davis: Wait a second. We object to what he told him.

The Court: Unless she heard it.

Mr. Sheppard: Unless it is connected up with this defendant, Your Honor.

The Court: Yes. Sustained.

Q. Just a moment. Had you sent for him, Mr. Hanley?

A. No, sir.

Q. Had you communicated with anybody down there about your case?

A. No one, only my nephew. We talked the matter

over.

Q. You talked about it. But I mean, you did not ask anybody, Mr. Hanley or anybody else, to come and talk to you about the case? A. No, sir. I did not.

Q. All right. Then how long did you stay down in

Kentucky?

A. Well, I was going to tell you, that they asked me, [fol. 191] they wanted me to come over to the office.

Mr. Sheppard: Just a minute. I thought all that had been stricken out.

Mr. Hay: I think this perhaps is inadmissible. She can't testify that they sent this man to her so we will omit that for the moment.

Q. Now, Mrs. Stewart, how long did you stay in Kentucky!

A. Well, in July, my daughter wrote me that there was a man came there representing an insurance company—

Mr. Sheppard: Well, we will move to strike that out, Your Honor, for two reasons, first it is not responsive to the question, and second, because it is hearsay.

The Court: Sustained.

Mr. Hay: Just a moment.

Q. Just answer this question first, Mrs. Stewart, as to how long you stayed down in Kentucky. You say you went down to Kentucky? A. Yes, sir.

Q. How long did you stay there?

A. Well, I was there most of the summer. I just don't remember just what date it was now I did come back.

Q. Now, while you were down there after this, that you started to mention a moment ago, did anyone else come to see you to talk settlement of the case with you?

A. No. sir.

[fol. 192] Q. I see. Now, when did you next have a discussion with anyone about a settlement of the case?

A. Well, I had never met anyone after that to talk about

the case, not until-until this come up in November.

Q. And that was the time just before the settlement was finally arranged? A. Yes, sir.

Q. Now, from whom did you get a message, or did you

get a message to come to see anybody?

A. Mr. Haun sent a message to my son-in-law.

Mr. Davis: Well, we object to that unless she knows herself.

The Court: Sustained.

Q. Who is your son-in-law?

A. Henry Hamm, and the message was sent to me and I have the message.

Q. Have you that with you; do you have that message here? A. I think Mr. Noell has the message.

Mr. Davis: That is all right.

Mr. Hay: Mark this Plaintiff's Exhibit "D".

(A telegram was marked by the reporter as Plaintiff's Exhibit "D".)

Q. I show you what has been marked Plaintiff's Exhibit "D" and ask you if that is the telegram to which you refer!

A. Yes, sir. I had gone to Coulterville or to Castleton, Illinois, at the time, but she sent it to me up there.

[fol. 193] Mr. Hay: We offer in evidence this telegram, Plaintiff's Exhibit "D", in connection with the testimony of this witness.

Mr. Davis: No objection.

(Thereupon Mr. Hay read to the Court and the jury the document identified as Plaintiff's Exhibit "D", which is, in words and figures, as follows, to-wit:)

(Plaintiff's Exhibit D.)

"Oakland City, Indiana. Henry Hamm. 1521 Gaty Avenue

Mr. Campbell suggests you and Mrs. Stewart be at my office 3:30 to 4:00 P. M. Thursday. Important.

H. B. HAUN."

[fol. 194] Q. Now, after you got this telegram, I mean you got word that Mr. Hamm had received this telegram, what did you do? A. I came back.

Q. And where did you come to?

A. I come to my daughter's, Mrs. Hamm, in East St. Louis.

Q. Over in East St. Louis? A. Yes, sir.

Q. Now, when you got there tell the jury whether or not you learned that this Mr. Hamm had a message for you from someone connected with the Southern Railway Company.

A. He had been called to the office several times.

Q. Well did-

Mr. Sheppard: We move to strike that out, Your Honor. That is hearsay, of course.

The Court: Sustained.

Q. Well, did he have or state to you that he had a message from Mr. Campbell or Mr. Howell, or Mr. Campbell connected with the Southern Railway, with respect to the settlement of your case?

Mr. Sheppard: We certainly object to that, it is hearsay of the rankest type.

The Court: Sustained.

Mr. Hay: I think we can follow that up.

The Court: A statement from whom, Mr. Hay?

Mr. Hay: From Mr. Campbell, attorney for the South-[fol. 195] ern Railway.

The Court: He told her, according to your question.

Mr. Hay: Mr. Hamm, it has been stated here by a witness already on the stand, Mr. Wiechert, that Mr. Hamm brought Mrs. Stewart into the office and we propose to show that Mr. Hamm was called in at the instance—

Mr. Sheppard: We object to this statement, Your Honor.

The Court: Sustained. It is purely inadmissible.

Mr. Hay: All right.

Q. Now, when you came back, and following this telegram, tell the jury whether or not you learned that Mr. Hamm had been called to the office of the Terminal Railroad Company in connection with this case.

Mr. Sheppard: Now, Your Honor, that is an indirect way of avoiding the rule of Your Honor.

The Court: Objection sustained.

Mr. Sheppard: I think counsel should be instructed not to ask prejudicial questions of that kind.

Mr. Hay: Now, just a moment. I wish to show by this witness the communication that came to her as bearing upon her attitude toward a settlement of this case.

We propose to show, as I started to state a moment ago [fol. 196] and the gentleman objected to my—

Mr. Sheppard: I again object to what counsel's purpose is to show.

Mr. Hay: I want to make my position clear to the Court.

Mr. Sheppard: This may be a prejudicial statement.

The Court: I don't know what it is you are trying to show now, Mr. Hay.

Mr. Hay: I am trying to show pursuant to this telegram she was called in and learned from Mr. Hamm—

The Court: I mean, whose statement is it that you are trying to show by her, a statement to her by somebody else?

Mr. Hay: No, sir. I am trying to show what she learned with respect to the proposal to settle her case, which was followed up by her going to the offices as has already been testified to here by Mr. Wiechert, and what induced her to go to that office.

The Court: How did she learn what you are trying to find out?

Mr. Hay: That is what I am doing, that is what I am seeking to show by her, that she learned from Mr. Hamm that a proposal had been made to him.

Mr. Sheppard: Now, we object to the statement, what [fol. 197] she learned.

The Court: Sustained.

Mr. Sheppard: Counsel knows better than that.

The Court: The objection is sustained.

Mr. Hay: I object to these constant indicatings on the part of this gentleman to tell me what I know I do not know about matters. I am seeking in good faith to try to present this matter.

If the gentleman objects to any statement before the jury, I have no objection to the jury being withdrawn, but I am trying to show here—I will come up here and state it to you gentlemen.

The Court: I think I understand what you have in mind, but I think it is objectionable.

Mr. Hay: Very well.

Q. Now, let me ask you, when was this that you talked to Mr. Hamm about a settlement of this case?

A. I wanted to know why he asked me to come back.

Mr. Davis: No, no, no.

Q. Just answer the question, when was it you talked to him about it, Mrs. Stewart?

A. When I came back.

The Court: Came back from where?

A. From Castleton, Illinois.

By The Court:

[fol. 198] Q. From where?

A. From Castleton, Illinois.

Q. And when was that with relation to the time you went to the office of Campbell and Wiechert, as has been testified to here in connection with the settlement of the case? A. Repeat that question, please.

Q. I say, when did you have your talk with Mr. Hamm

with respect to the time-strike that out.

How long before you went to the offices of Mr. Wiechert and Mr. Campbell was it that you talked to Mr. Hamm?

A. Well, just a few days.

Q. Just a few days before? A. Yes, sir.

Q. And pursuant to what Mr. Hamm said to you you went to the office of Campbell and Wiechert in East St.

Louis, is that right? A. Yes, sir.

Q. Now, up to that time had there been any other proposition made to you personally, except the four thousand dollar proposition that Mr. Haun made to you down in Coulterville, Illinois?

A. No, sir.

Q. Now, it appears that in the office of Mr. Wiechert [fol. 199] there was an understanding that the case should be settled for five thousand dollars. When did you first learn that any offer of five thousand dollars was made?

A. Mr. Hamm told me.

Mr. Sheppard: Now, Your Honor, we will have to object to that because that is hearsay, of course.

The Court: You must not tell, Mrs. Stewart, what Mr. Hamm told you. I sustain the objection to that.

Mr. Hay: Well, Your Honor, I can't show-

The Court: Not from Mr. Hamm.

Mr. Hay: That the proposal, the proposition is from some source, this good lady learned that they were offering five thousand dollars.

The Court: I cannot permit her to testify to what Mr. Hamm told her, I do not think.

Mr. Hay: Well, Mr. Hamm was the gentleman delegated to take the message to her, and we will show that.

Mr. Sheppard: Well, Your Honor, I suggest that be shown first. That is orderly procedure.

Mr. Hay: I do not know that it is necessary in the order of the proof that we show that first.

The Court: Yes. With that sort of testimony I think it is better to make your showing first, and then avoid the possibility of having it stricken out.

[fol. 200] Q. Now, Mrs. Stewart, when was it that you first learned that an offer of five thousand dollars was being made to you?

A. Well, they won't let me tell.

Mr. Hay: I think that is a good answer. Just a moment.

(At this point there was a discussion at the sidebar between counsel and the Court, off the record.)

The Court: Announce an adjournment until tomorrow morning at 10:00 o'clock.

At this point, 5:00 P. M., Friday, June 9, 1939, an adjournment was had until 10:00 o'clock, Saturday, June 10, 1939.

Pursuant to the said adjournment, the Court convened at 10:00 o'clock, A. M., Saturday, June 10, 1939, and the following proceedings were had:

The Court: You may proceed in this case.

Mr. Davis: Your Honor said we might put the doctor on the stand the first thing this morning.

The Court: Yes.

Mr. Davis: We have him here.

And thereupon the defendant, to sustain further the issues in its behalf, offered out of turn, by permission of the Court, as a part of its case in chief, the following evidence:

[fol. 201] Dr. A. B. McQuillan, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination.

By Mr. Davis:

Q. Doctor McQuillan, will you please state your name!

A. A. B. McQuillan.

Q. Are you a practicing physician?

A. Yes, sir. Q. Where?

A. I live in Illinois, licensed to practice medicine in Illinois.

Q. And where do you—what is your address in Illinois?

A. My office address is 410 First National Bank Building, East St. Louis, and I live at 19 Country Club Drive, Belleville, Illinois.

Q. Are you associated with any hospitals, doctor?

A. Yes, sir. I am on the staff of St. Mary's Hospital and the Christian Welfare Hospital in East St. Louis.

Q. And of course you are a graduate of a medical school? A. Washington University.

Q. Now, did you know John R. Stewart?

A. No, sir, not prior to his injury.

Q. Well, at the time of his injury you knew him, did you? A. I knew him, yes, sir.

Q. Did you operate on him?

[fol. 202] A. Mr. Stewart was injured on the 12th day of February, 1937 by a crushing injury of his forearm, right hand.

Q. Now, where was that forearm crushed, Doctor!

A. It was crushed from the elbow down to the wrist.

Q. From the elbow to the wrist?

A. Yes, sir; and he was brought into St. Mary's Hospital with very little shock, but we gave him shock treatment, gave him glucose intravenously, normal solution; and a blood count made which showed he had 4,800,000 white blood cells, that he had not lost very much blood. We gave him tetanus and gas bacillus antitoxin. He was put to bed with the foot of the bed elevated, and of course his arm was dressed. There was nothing done to his arm except to dress it and place a tourniquet around his arm, which remained there untied, so that if he started bleeding they could quickly stop the bleeding, and he was put to bed.

On the following day his condition was as well as could possibly be expected, and at 3:00 o'clock or 3:30 in the afternoon this traumatic amputated arm was removed. Well, at the time when he came in his arm was so badly severed that there only two tendons holding it to the crushed bone of the elbow, and these were cut with a scissors and the arm removed.

The next day, the, oh, three or four inches of the bone of the forearm, and the bone of the elbow joint were show-[fol. 203] ing, had no flesh around them, and at that time the destroyed fragments of the tissue remaining was cleared up, that is, by cutting it off, and he was put to bed.

- Q. Well, now, was his arm amputated above the elbow?
- A. At the elbow.
- Q. At the elbow?
- A. It was simply, the arm was traumatically amputated at the elbow, but a few of the bones in the elbow and the arm remained without any tissue and the operation was simply removing those exposed bones.

Q. You mean by that, that when you cut it off that left

some bones extending from the elbow?

A. It was cut off already, except the arm was only hanging by two small tendons:

Q. I say, when you cut those tendons. A. Yes.

Q. Then it left those bones exposed? A. Yes.

Q. And you merely cut off the bone at the elbow?

A. Yes.

Q. Now, what happened after that, Doctor?

A. Well, he was removed to his room in very good shape. His condition was very good. And he came out from under the anesthetic without any difficulty.

The next morning he began to, or even that night, later on, became somewhat delirious and restless, and he de-[fol. 204] veloped delirium tremens, and we had to put him in restraint.

Q. Now, what is delirium tremens caused from, Doctor?

A. From alcoholism; and we continued to give himof course, he was given whiskey immediately after his
entrance into the hospital, and he was given whiskey right
along, he was given two teaspoons full or two tablespoons
full three times a day until he developed his delirium
tremens, and then he was given various sedatives that we
employed at that time, paraldehyd, and affairs of that
kind. He always had to have morphine for his pain.

His condition was fairly good all the time until the day of his death, and that evening after 6:00 o'clock, his nurse—

Q. What evening was that, Doctor?

A. That was on the 14th, he died on the 14th after 6:00 o'clock.

The Court: What day was he injured on?

Mr. Davis: The 12th.

The Witness: He was injured on the 12th.

Q. Now, at 6:00 or 6:30, did you say on the evening of

February 14th?

A. Yes, about 6:00 o'clock, and his nurse called me, told me he had suddenly gone bad as she expressed it, and I immediately went to the hospital. When I arrived there [fol. 205] he was in a state of collapse. He was cold, pulseless, and his chest was full of moist rales, and in fact, he was dying by the time I got there.

Q. And what time did he die, Doctor!

A. 8:20, I think 8:20.

Q. Now, what would you say was the cause of his death?

A. Well, the direct cause of his death was the delirium tremens, with a cardiac dilatation. He developed a cardiac dilatation according to the history, and of course, he had a certain amount of shock, but his principal cause of death was delirium tremens.

Q. Now, Doctor, did you have a conversation with Mrs. Stewart with respect to whether or not he—

A. Yes, sir.

Q. (Continuing)—used intoxicants?

A. And with the family, and I have a letter here, if I can introduce that, that I wrote to Doctor Chartle, the chief surgeon, relative to this man's condition following his death, I notified Doctor Chartle, who is the chief surgeon.

Q. Of what?

A. Of the Southern Railroad, that John Stewart, switchman, 1521 Gaty Avenue, East St. Louis—

Mr. Hay: We object to that.

The Court Sustained.

Mr. Davis. That is all right, if they object to it. They [fol. 206] object to it.

The Witness: All right.

Q. Why did you give him the whiskey, Doctor, those

two tablespoons full at a time?

A: Well, I was told by his family, by his wife, that he was subject to drinking, that he drank at intervals, had intervals of drinking, that he never drank while he was on duty, but at times he would lay off, and then he would drink, that when he got through with his spell he would go back to work; and also that he had only been to work I think one day, I think that was the same morning, and that previous to that he had been on a drunk.

Q. Was the giving of this whiskey necessary, Doctor?

A. Oh, yes. All these cases in which men are alcoholic, or in which they take alcohol, or in which they have had alcohol, or I mean been an alcoholic for years past, twenty or thirty years, why we make it an invariable practice to give them whiskey.

The Court: You say that if he used alcohol twenty or thirty years before?

A. Yes, sir. If they were habitual users of alcohol they can develop a delirium tremens.

The Court: After twenty-five or thirty years?

A. Yes, sir, without ever having touched a drop in the

[fol. 207] meantime.

Q. Now, Doctor, did this whiskey that you gave him, these two tablespoons full three times a day, did that cause delirium tremens? A. No, sir.

Mr. Davis: That is all.

Cross-Examination.

By Mr. Hay:

Q. Did I understand you to say, you started to say that you wrote something to the Southern Railroad about this; whom were you representing in treating this man?

A. I was representing the Southern Railroad.

Q. Oh. Let me see that report, will you (addressing the witness)? How long have you been representing the Southern Railroad?

A. I don't know, quit a few years.

Q. And all that you did there in making reports, everything else you did you were representing the Southern Railroad, is that right? A. Yes, sir.

Mr. Hay: That is all,

Mr. Davis: That is all, Doctor. Thank you.

The Court: We will announce a three-minute recess.

[fol. 208] (Recess, three minutes.)

The Court: Proceed, Gentlemen.

Cross-Examination, Resumed.

By Mr. Hay:

Q. Doctor, this report that you—that I had in my hand and which you brought over is the hospital report in this case, is it?

A. No. That, from there on is, this other is my own private, duplicates of my report to the company, and letter to the chief surgeon.

Q. But the part which I now hold in my hand here?

A. Yes, sir, that part.

Q. Is the hospital record that was made at the time?

A. Yes, sir.

Q. Now, these entries that are made on this record,

Doctor, from page to page, are made by whom?

A. Well, this—that one (indicating) was made by the interne in the emergency room, see, at the time that I was there. That is the emergency room record.

Mr. Sheppard: Which one is that?

Mr. Hay: Now, let's take it up.

Q. The first page was made by you, was it?

A. Yes, sir.

Q. The first page marked—

A: That is the diagnosis, complete diagnosis.

[fol. 209] Q. Diagnosis. Now, the second page, which is the first pink sheet, that was made by the interne?

A. And signed by me, in my presence in the hospital,

yes, sir.

Q. Signed by you in the emergency room. Now, the next page is the third page, and that was made by whom?

A. That is the history taken by the interne.

- Q. That is by the interne. Now, the entries made on the next page, and I note that the pages which I have just referred to are all under the date of February 12th, I think, Doctor.
 - A. No. Which ones now?

Q. That (indicating).

A. No, this is date of admission.

Q. That is the date of admission?

A, Yes. This is the date of discharge.

Q. On the 14th? A. Yes.

Q. The dates are shown here, next to the pink sheet February 12th. A. Yes, date of admission.

Q. And the next page is February 12th. Now, we come to a date February—

By Mr. Sheppard:

Q. What is this here?

. That is the laboratory report.

Q. Laboratory report, that is under date of—

A. It should be the 12th, the day he came in.

Q. The 12th. All right, now the next page.

[fol. 210] A. The next page is the operating room report.

Q. The operating room report?

A. That would be the 13th.

Q. On the 13th, yes. Now, the next page.

A. The page-

Q. Beginning with the next page.

A. It should be from this side on, the date the 12th, those are my orders to the nurses.

Q. And whose handwriting are these?

A. Well, the first, confidential, in the handwriting of Doctor John Brennan. I dictated them, and the next is in my handwriting, and the next is by Doctor Crotty, the man who gave the anesthetic the following day, and most of the rest is in my handwriting.

Q. Yes. Now, beginning here with what appears to be

a detailed record of the case, is that right?

A. No. Yes. No, this is the detailed record of his medication.

Q. Yes. All right.

A. And this is the detailed record of the nurses, the nurses' report.

Q. Now, the nurses' report are on the last two pages here? A. Yes, sir.

Q. And that report covers the time from his entry?

A. Until his death. [fol. 211] Q. At 6:45?

A. No. As soon as we could get a nurse, 8:00 o'clock, she came on duty at 8:00 o'clock.

Q. All right. Now, at what time did you first see the.

A. Well, I probably saw him, I think, I don't know, it may be down there in that sheet. I saw him immediately after his accident, as soon as I could get down there.

Q. At that time his arm, as you say, was traumatically amputated, you mean by that in laymen's language it was

mashed off.

A. It was completely mashed off with the exception of hanging on two tendons.

Q. His bones crushed?

A. Crushed off until about the, approximately third of the forearm and elbow.

Q. At what hour was the final separation made, the cutting off, or cutting of the two tendons so as to take that off entirely?

A. /mmediately after I got down there to the hospital.

Q. And then when did you next see the patient?

A. I suppose I saw him the next morning, I don't remember it. It would be on the chart there.

Q. And would you be able to say from this?

A. I stayed down there, and we gave him all the treatment for shock, probably spent an hour or two with him [fol. 212] there, and I probably did not see him again until the next morning. I saw him the next morning.

Q. What time? A. 9:00 o'clock. Q. And when did you next see him?

A. That afternoon when I amputated his arm.

Q. What time? A. 3:00 o'clock.

Q. Then when did you next see him?

A. I next saw him the next morning, between 6:00 and 7:00 o'clock.

Q. And when next?

A. I next saw him that evening at 8:00 o'clock and he

expired at 9:20.

Q. You referred to a statement that you made to Mrs. Stewart. I will ask you whether or not you did not state to Mrs. Stewart, after you had looked him over, given him the first treatment, that you thought he was in very good condition and would likely pull through?

A. Probably did. His condition was very good. I got

it noted on that chart.

- Q. And you entered here, I believe, that he died of delirium tremens? A. Yes, sir.
 - Q. You have entered that as the primary cause?

A. Yes, sir.

Q. Of this man's death? A. Yes, sir.

Q. Did I understand you to say to Judge Moore that if [fol. 213] a man had drunk liquor, and has gone for twenty-five years without drinking a drop, that if he had an injury like this, he might develop delirium tremens?

A. Yes, sir.

Q. And you would say that he died of delirium tremens?

A. Who?

Q. The fellow who had not touched a drop?

A. It would all depend what he did die of, how he died.

Q. Well, let's assume that a man who had his arm mashed off, had not touched a drop for twenty-five years, that he following that experience could die of delirium tremens? A. Yes, sir.

Q. I see. In other words, if a man never touched a drop of liquor in his life, and gets his arm mashed off, he

is in danger of dying of delirium tremens?

A. I never said a drop. I said an alcoholic.
 Q. Oh, an alcoholic. A. That is different.

Q. A man gets drunk away back twenty-five years before he gets his arm mashed off, he may die of delirium tremens? A. No. I would say not.

Q. You would say not. But you still—well, that is comforting to me, Doctor, your theory. I want to make a confession here. When I was a child from six years old—

Mr Sheppard: Your Honor, we object to counsel laying [fol. 214] bare his life—

The Court: Sustained.

Mr. Hay: I just wanted to express my gratification of the fact that I did not get drunk at that time, but only sipped liquor, that I am not likely to die of delirium tremens, even if I get my arm mashed off.

Mr. Sheppard: Now, Your Honor, over our objection and in spite of Your Honor's ruling, counsel has insisted on making a spech to the jury, and I ask that Your Honor rebuke counsel for this horse play in the trial of a case.

The Court: Yes. I think counsel made that statement in face of the Court's ruling.

The Court will reprimand counsel for the statement made in the face of the Court's ruling.

Mr. Hay: I beg Your Honor's pardon. I just could not help it.

Q. And you still say this man died of delirium tremens? A. Yes, sir.

Mr. Hay: That is all.

Redirect Examination.

By Mr. Davis:

Q. Doctor, just explain how that may be done?

A. Well, this is not the theory, as Mr. Hay said it was.

It is an actual fact, and any doctor, anybody doing much [fol. 215] traumatic surgery, industrial surgery, or a good deal of surgery, they know that these patients are liable, where they have an accident, an irritation of some kind, something to precipitate it, can develop delirium tremens. I do not say they always do, but it is so well known that we put them ordinarily on a—we get a history of alcoholism years back, still as a safety first measure we always put them on whiskey. Now, every once in awhile you see some of these people who are reformed, and have been in the church, go into delirium tremens, where they are not put on whiskey, where they have been alcoholic far back. This is not theory. It is an actual fact, medical fact that has been treated, and the doctors do that right along. That is all I can say. It needs a precipitating factor.

Mr. Hay: How is that?

A. I say it needs a precipitating factor.

Mr. Hay: Yes.

A. It can be a trauma. However, occasionally sickness will precipitate delirium tremens. Trauma more generally, and it is expected among those familiar with traumatic work and do a lot of traumatic work, that is more or less expected.

Q. Now, Doctor, you said that you graduated from

Washington University, when?

A. I graduated in 1903.

[fol. 216] Q: And have you been practicing continuously since that time?

A. With the exception of the time I was in the Army. .

Q. And how long were you in the Army? A. Two years, approximately two years.

Q. Were you there as a surgeon?

A. I was there as a surgeon, yes, sir.

Q. And you had a good deal of practice at that time, did you not, Doctor? A. Yes, sir.

Q. Were you across the waters? A. Yes, sir.

Q. Doctor, have you ever taught medicine or surgery?

A. Yes, sir.

Q. Where?

A. I was instructor in anatomy at St. Louis University from 1911 to 1917, and from 1917 to 1935 I was in the Sur-

gical Department; the last three or four years I was quiz master for the seniors in surgery.

Q. That was at St. Louis University?

A. That was at St. Louis University Medical School.

Q. Are you a member of any medical societies?

A. Yes, sir.

Q. Which ones?

A. I am a member of the American Medical Association. I am fellow of the American College of Surgeons, and the Illinois Medical School, and St. Clair—oh, quite a few others.

Q. And you are a member of these two staffs of the

[fol. 217] hospital? A. Yes, sir.

Q. And these records to which Mr. Hay referred are the records of the St. Mary's Hospital at East St. Louis?

A. Yes, sir.

Q. They are not your records? A. No, sir.

- Q. Now, these other papers here are your private records?
- A. This is a duplicate of the initial report I sent to the Southern Railway. This is a duplicate of the letter I wrote to Doctor Chartle, the chief surgeon at that time, and this is the final report I sent to the Southern Railroad.

Q. That is, these are copies of that?

A. Copies, yes, duplicates.

Q. How much experience have you had in traumatic

surgery, Doctor!

A. Well, I have been specializing in surgery since 1915. I do quite a lot of traumatic surgery along with my private work. I do private work also.

Q. Is your chief business that of a physician or surgeon

for the Southern Railway Company!

A. Oh, no. The Southern Railroad is the smallest part of my work.

Q. And how are you designated as a surgeon by the

Southern Railway?

A. I am the local surgeon for the Southern Railway. [fol. 218] Q. In order that if anybody is injured, you go on and may attend to them?

A. Yes, yes, so that railroad men who are injured get

attention immediately, designated attention.

Q. Have you a system in effect at the Southern Railway that the men pay so much a month for medical attention? A. No, no. I am on a fee basis.

Q. On a fee basis? A. Yes, sir.

Q. Are you a member of any other hospital staffs than those you mentioned? A. No.

Mr. Davis: That is all.

Recross Examination.

By Mr. Hay:

Q. Now, Doctor, it is possible for one to be delirious without having delirium tremens? A. Yes, sir.

Q. One may become delirious from pain, may one not?

A. Well, I do not think so. I do not think so.

Q. One may become delirious from loss of blood?

A. No. Well, oh possibly yes, they become delirious, I think what you are trying to get at, if a man had a trauma and his arm knocked off, and is delirious, if he gets delirium from that, that would be delirium from absorption. [fol. 219] Q. Absorption from what?

A. Well, when you open a wound you sacrifice a tissue and you mash the tissue you have your fluids there, which are changed, changed chemically, most of them are changed

chemically and you have some absorption.

Q. Isn't it true that patients over and over again, almost without exception, at some stage of a severe illness become delirious?

A. Oh, no, no, no, I should say not. Q. But it is a frequent occurrence?

A. It is an occasion, yes, it is a frequent occasion, sure.

Q. And you are clear on the proposition that one may be delirious without having delirium tremens?

A. Oh, yes, sure. Sure.

Q. And this record here made by the nurses, from hour to hour and from day to day gives the complete history of what he did?

A. From the nurses' standpoint.

- Q. From the nurses' standpoint? A. Yes.
- Q. They saw him more than you did, didn't they?

A. Yes.

Q. They were there constantly? A. Yes.

Q. And what he did, and what utterances he made, we would expect to find down here?

[fol. 220] A. The majority of them, the major ones, sure. Q. And if you were going to get a history of him, to see what, just what his condition was and what he went through, you would go to the nurses' record, wouldn't you?

A. Partially, yes.

Q. Yes.

A. Of course, the nurses, now the nurses were telephoning me right along and also the internes. You will see where the internes are in there, I am in constant touch with them.

Q. And this man, I believe—well, you have stated when

you personally saw him?

A. Yes, sir.

Q. I see. And the record made up here was not made by you, but made by those who were in attendance?

A. Yes, sir.

Q. And saw him and observed him, recorded what he did?

A. Yes, sir.

Q. And how he was? A. Yes, sir.

Mr. Hay: That is all.

Redirect Examination.

By Mr. Davis:

Q. Doctor, do these hospital records show any treatment that was given him for delirium tremens?

A. Yes, sir.

[fol. 221] Q. What are they, doctor?

A. Well, this represents my orders for the man. Do you want me to go through the whole thing?

Q. Yes, sir.

A. Well, immediately when he came into the hospital he was treated by me, and I ordered antitoxin, and—

Q. What was that for?

A. That is to prevent lockjaw or gas bacillus, gangrene.

The Court: The question is only directed to what you gave him for the purpose of preventing delirium tremens.

Mr. Hay: Yes.

Q. Yes.

The Witness: That is all you want?

Mr. Hay: I think he testified to that.

A. And gave him two tablespoons full of whisky three times a day, and the next day. the next morning I ordered

four ounces of paraldehyde by the rectum, that is one of the principal things we use in delirium tremens.

I also ordered that he be given some morphine, strychnine. He was getting worse and I increased his whisky from two tablespoons full to an ounce of whisky four times a day. Later on in the afternoon, the day that he died, or the morning when I saw him, I also gave him two teaspoons full of lexophena barbital, every three hours.

[fol. 222] Now, that is the treatment.

Q. And he was given that? A. Yes, sir.

Mr. Davis: I think that is all.

Recross Examination.

By Mr. Hay:

Q. When did you prescribe that treatment?

A. The first whiskey was 2-13, two tablespoons full of whiskey three times a day; the morning of the 14th he got the paraldehyde, he got his morphine. Of course, morphine had been prescribed before. Later in the day he got an ounce of whiskey, and I ordered it instead of two tablespoons full twice a day, to give that four times a day, an ounce four times a day, and at 9:00 o'clock that morning he was ordered to have two teaspoons of lexophena barbital, and to give that in conjunction with the whiskey, or give it every three hours.

Q. Is it your position, Doctor, that the crushing off of

his arm was not the cause of his death?

A. I give the primary cause of his death.

Q. I say, is it your position-

A. The secondary cause, not the primary.

Q. That it did enter into it very vitally, didn't it?

A. It entered into it, yes, sir.

[fol. 223] Mr. Hay: That is all.

Redirect Examination.

By Mr. Davis:

Q. How much is an ounce of whiskey, Doctor, how many tablespoons?

A. Well, ordinarily it is given-

The Court: It is a little over half a drink, isn't it?

A. Well, if they use a tablespoon full measure, which is seldom used, which is used medically, which should be

used, it is two tablespoons full ordinarily, which is considered four of the dessert spoonfuls or a teaspoon full.

Q. The answer is—

A. Yes, a teaspoon full, that is the regulation teaspoon full, not the little teaspoon full you ordinarily find on the dining room table. Those are all measured out in measuring glasses.

Mr. Davis: That is all. Mr. Hay: That is all.

And thereupon the plaintiff offered further evidence in rebuttal, as follows:

Mr. Hay: May I explain to the Court that I wish to withdraw the plaintiff at this time further for the purpose of putting in the testimony, or offering the testimony of [fol. 224] Mr. Joseph L. Howell, about which there was some discussion yesterday afternoon, at this time, rather than later to put in his testimony.

The Court: Very well.

MILDRED J. COOK, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, in rebuttal, as follows:

Direct Examination.

By Mr. Hay:

Q. Your name is? A. Mildred J. Cook.

Q. Miss Mildred J. Cook. Your profession, Miss Cook!

A. I am a shorthand reporter.

Q. I will ask you whether or not you reported the hearing—

Mr. Davis: Now, Your Honor, we will admit that she reported that hearing, and this is the testimony of Judge Howell.

Mr. Hay: Very well.

The Court: That is all you want, then.

Mr. Davis: And we will further admit that this transcript shows that that testimony is recorded correctly.

Mr. Hay: Thank you very much, Miss Cook.

The Court: Miss Cook is excused.

[fol. 225] Mr. Hay: We offer in evidence the testimony of Joseph L. Howell, given on the hearing before Your Honer January 21, 1938.

Mr. Davis: We have no objection to the testimony, Your Honor.

(The said testimony is, in words and figures, as follows, to-wit:)

Direct Examination.

Read By Mr. Hay:

"Joseph L. Howell, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the movant, as follows:

Direct Examination.

By Mr. Noell:

- Q. You were subpoensed by the plaintiff, were you, Mr. Howell? A. Yes.
 - Q. Please state your full name.

A. A. J. Howell.

Q. Where is your office!

A. Union Station, St. Louis, Missouri.

Q. How long have you been attorney for the Terminal Railroad Association?

A. It will be thirty-six years the first day of next May.

Q. Have you at any time represented the Southern Railway Company during that time?

A. I never have, sir.

Q. Did you call or write to Henry Hamm to come and see you at Union Station?

A. I requested that Mr. Hamm come in and see me.

[fol. 226] Q. Where did Mr. Hamm work at?

A. He works on the East side.

Q. For your company? A. Yes, sir.

Q. That is, the Terminal Railroad Association?

A. Yes; he is a switchman.

Q. Were you in any way interested in this lawsuit of Mrs. Stewart?

A. I didn't know there was a lawsuit.

Q. How is that? A. I didn't know there was a lawsuit. Q. What did you talk to Henry Hamm about, then?

Well, this is before the Court and I will state the preliminary proceedings. Mr. Haun, of the Southern, came into my office and told me that he had a case on the East side, of the death of a switchman; that he was trying to effect a settlement with the widow; that he had offered the widow five thousand dollars, and that the widow was willing to accept five thousand dollars, but that her son-in-law, Bill Hamm, who is one of our switchmen, would not allow her to make the settlement and was standing in the way of a settlement, because she would get tangled up with a lot of lawyers and they would get what she got; that the Southern had told Mr. Hamm that they would give her five thousand dollars clear and would stand any expense that she was put to by reason of that settlement; that that was all right with him, but he was afraid of claim agents, or [fol. 227] railroad lawyers, and unless they would put it in writing he wouldn't allow his mother-in-law to take it.

He said, 'Those boys think a lot of you. I think Hamm has confidence in you, and I think if you had a talk with Hamm and explained the situation to him it may help matters.'

Q. Did you know Hamm before? A. Yes.

Q. Where did you know him?

A. Hamm has been an old employee on the East side for about nine or ten years.

Q. Do you know him personally, to talk with him?

A. Yes, I met him in my rounds.

Q. When was the last time you talked with Hamm before you asked him to your office?

A. I couldn't tell you that.

Q. He is still working for you? A. Yes.

Q. Have you brought him here to court today?

- A. No, sir; I have no business bringing him here to court.
- Q. Can you tell us the last time you talked to Hamm before you called him up here to your office, and what business you transacted with him?

A. No; I can't keep track of those things; I talked with

so many.

Q. Are you sure that you did know Hamm before he came into your office?

A. I have known Bill Hamm.

[fol. 228] Q. How many thousands of employees have you on the East side? A. On the East side?

Q. Yes.

A. We run an average of between thirty-six hundred and four thousand on the property, and I imagine about fifty per cent, on the East side.

Q. Do you know those men personally, all those men?

A. No; that would be impossible.

Q. Is your work chiefly the legal end of things over there at Union Station, or do you have something else?

A. That is what I am supposed to do, but I do a lot of

other things.

Q. Do you have something to do with the operation of trains? A. Not with operation, no, sir.

Q. Is it your business to be acquainted personally with

the switchmen?

A. No, sir; I just come in contact with those men.

Q. You say you have known Henry Hamm for nine years?

A. Well, I know Henry Hamm has been over there for

nine or ten years.

Q. That is, working for your company? A. Yes.

Q. Is that your own direct knowledge, or what you have learned since this matter came up?

A. I think I knew when Henry got the promotion to switchman. I think it was about two years ago.

[fol. 229] Q. When was that?

A. That is just offhand. I can tell you by the record, but we don't keep these things in our minds.

Q. When had you talked with Mr. Haun, the Claim agent of the Southern, prior to the time that you ordered

Mr. Hamm up there?

- A) Oh, I think it must have been a week. In explanation, the day that Mr. Haun was in there I think I called up the East side office and requested that they have Bill Hamm come in and see me his first opportunity. That was the request.
 - Q. He laid off a day to get over there, didn't he?

A. Yes, sir.

Q. And he received a check for that day?

A. Yes; we always pay; we are under agreement to pay. We can't get out of it.

Q. Was that a check out of the Legal Department?

A. No, that was operating expense.

Q. You originated the check, did you?

A. Yes; in my office.

Q. Did you get a refund on that check from the Southern? A. No, sir.

Q. Does the Terminal bear that expense?

A. It has done so-

Q. Did you send them a bill for the seven or eight dollars?

[fol. 230] A. No. sir.

Q. How much was it, do you remember?

A. I couldn't remember the amount. He is-

Q. For one day?

- A. (Continuing) He is a switchman. I would imagine it was six or seven dollars.
 - Q. And the Terminal is paying that, is that right?

A. It has paid it.

Q. And never sent a bill to the Southern?

- A. As far as I know. The Auditor's office might catch that going through and might bill, but I don't think they have.
- Q. Would they do that without some information on your part? A. Yes, they can do it.

Q. Anyhow, your company paid him?

A. They paid him for his lost time.

Q. What right have-

The Witness: That is by agreement. When we call one of our men into our office we have to pay them for a day's work, if we only keep them thirty minutes.

Q. Have you any kind of arrangement with the Southern to call in your employees in matters of this kind, or

have you done that before!

A. Well, it has been my uniform practice. We are owned by sixteen proprietary lines, operating under a de[fol. 231] cree of this Court, that we shall act as an impartial agent for all those carriers. If one of those carriers requests anything in my line that I can do for them, I do it readily.

Q. This claim, however, you are not in any way famil-

iar with?

A. I never knew there was such a claim until Mr. Haun spoke to me.

Q. Did Mr. Haun tell you a suit was pending?

A. I didn't know anything about a lawsuit. The first thing I knew about the lawsuit was when you called me. That was the first time I knew there was a lawsuit. I knew there had been an accident there and he was settling up the accident.

Q. I told you that I wanted to verify that you had ac-

tually called in this son-in-law?

A. You called me up and bawled me out for interfering with your business.

Q. We were very friendly?

A. Yes, in a friendly way, but at the same time, a rose by any other name would smell just as sweet.

Q. We are still friendly? A. Sure.

Q. You told me that you had done that?

A. I told you that I had requested that Mr. Hamm

come into my office and had a talk with him.

Q. I said that I wanted to verify that you had done [fol. 232] that, before calling you in the case, is that correct?

A. I think you used those words, but I don't remember

what I said to you.

Q. You said it was part of the game. That is all, Mr. Howell."

Mr. Hay: Do want to read the cross-examination?

Mr. Davis: Yes, sir. This is cross-examination by Mr. Davis, that is me.

(Cross-examination read by Mr. Davis, as follows:)

"Q. Judge Howell, what conversation did you have with Mr. Hamm?

A. Hamm came into my office at about eleven-thirty, I think it was, on November 15th, if I remember the date correctly. He came walking into the office. I said, 'How-do-you-do?'

He said, 'What do you want with me?'

I said, 'Sit down a minute, Hamm. I want to talk to you. I understand that your father-in-law, a switchman for the Southern, was killed over there, and the Southern

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is trying to effect an amicable settlement with your motherin-law and they had about reached an agreement. They are offering to pay her five thousand dollars clear, and she is willing to take it, but that you are standing in the way.'

'Yes', he said, 'I am, because I don't want that woman gypped out of what money she gets.'

I said, 'How about the five thousand dollars?'

He said, 'That is the reason; that is all right to settle for that, if she gets the five thousand dollars.'

[fol. 233] I said, 'What would it take to convince you that she would get the five thousand dollars?'

'Well', he said, 'I want it put in writing.'

'Well, now', I said, 'they can't do that. Railroads don't do that, put things in writing like that. It is not right. If the Southern tells you that they will pay your mother-in-law five thousand dollars clear, you can depend on what they tell you.'

Well, he didn't know whether he could or not. I said, 'You know Bruce Campbell, don't you?'

He said, 'Yes, I do.'

I said, 'If Bruce Campbell tells you that they will see that your mother-in-law gets five thousand dollars clear, and they stand all other expense, would you not believe him?'

'Well', he said, 'I would rather it would be put in writing.'

I said, 'Would you believe me if I would tell you right now?'

'Yes, if you tell me that I will believe it.'

He said, 'Mr. Campbell will tell you the same thing.'

He said, 'If he will do that, that is all right.'

I said, 'Don't let us have any misunderstanding about this, Hamm.' I got this kind of quickly and I didn't un-[fol. 234] derstand the situation. I turned around to my desk and called Bruce Campbell. I talked with Bruce Campbell and stated, in Mr. Hamm's presence, re-stated what I had already stated.

Mr. Campbell says, 'That is correct.' He said, 'Is Hamm there?'

I said, 'Hamm is right here now, listening, and Hamm says it is all right, that he thinks five thousand dollars is a reasonable settlement, if she gets that much money, and I have myself guaranteed him that she will get that, if you say so.'

He says, 'Why not have him come right up here?'

I said, 'That would be fine.'

I said to Hamm, 'Hamm, can you go right up to Mr. Campbell's office?'

He said, 'Sure.'

I said, 'Hop on a car.'

'You stay, Campbell, until he gets there.'

'Go on, Hamm, and whatever Bruce Campbell tells you I will guarantee', and he went out of the office. He said good-bye, shook hands, and away he went. That was the whole conversation.

At that time I was under the impression that it was an accident, and they were settling it up. I knew nothing more [fol. 235] about it, or heard nothing more about it, until Mr. Noell called me up on the telephone and had a conversation about the suit. I said I didn't knew there was a suit. I think the next morning I saw in the paper that there had been a suit filed.

Q. Have you seen Mr. Hamm since then?

A. No, I don't believe I have. I know I haven't talked to him.

Q. Did you ever know Mrs. Stewart, the administratrix of the estate?

A. No; no, I never knew there was such a woman.

Q. Did you ever tell Mr. Hamm, either directly or indirectly, that he would be discharged or fired if he didn't—if this settlement was not made?

A. I have given here as near as humanly possible the conversation that occurred. There was not a thing said. I

knew what position Hamm occupied. He was a good man, with a good record, and I knew what position he occupied, and I imagine he assumed I did. He was not even asked about what job he had, or where he worked, or anything about it. There was not a word said about the job; there was not a word said in any way, in a threatening manner. I was talking to him as a friend.

Q. He said nothing about the job at all?

[fol. 236] A. No, sir. It would have been ridiculous for me to have threatened Bill Hamm with his job. He would have laughed in my face and said, 'You can't take my job away, a man that has the seniority that I have.' There has to be some cause for it. That is the agreement with the Brotherhood, and sustained by the Labor Board.

Q. The job was not mentioned?A. The job was not mentioned.

Mr. Davis: That is all.",

(Here Mr. Hay read the redirect examination as follows:)

"Redirect Examination.

By Mr. Noell:

Q. Did Mr. Campbell tell you, when you talked to him on the telephone, that there was a suit pending and was to be tried in a week before Judge Moore?

A. No, he did not.

Q. Did Mr. Haun tell you that? A. No, sir.

Q. Mr. Haun personally came to see you! A. How!

Q. Mr. Haun personally came to see you, to talk to you!

A. He came up and said that they had an accident up on the East side and killed a switchman, and, 'I am trying to settle.'

Q. Did he mention my name in it?

A. No, sir. The only way I knew you were in it was when you called me up on the telephone. That was the first I knew there was a suit, or that you were in the suit.

Q. You spoke about Mr. Hamm being your friend.

[fol. 237] A. I call them all my friends.

Q. How often have you seen him in the last nine years!

A. I wouldn't attempt to tell you. I am around the yard office and around through the yards and they speak to me a lot of times. I couldn't tell you their names.

Don't you have a way of calling these men before you without going out to see them?

A. No, sir; I have never gotten into that habit.

Q. You don't call them in?

A. No, sir; when I want anything I usually go and get it.

Q. Is this the first time you called in an employee of the Southern to help them settle a case?

A. That is the first time I had anything to do with the

Southern.

Q. Or any other company?

A. I would not say that. Possibly, in thirty-five years, I have talked to some others.

Q. This was a fairly unusual and rare thing for you, was it not, to call in an employee?

A. No, sir. I talked to them, all of them.

Q. The fact that Hamm was called in by you, did he seem to treat you with respect and a certain amount of fear?

A. No, sir. They all treat me with respect; I have never seen one of them afraid of me, though.

[fol. 238] Q. Do you know what effect it has on one of

the employees, how they feel, when they are called up to the Legal Department?

A. It is impossible for me to know their feelings.
 Q. I mean, by your observation.

A. They always come in very friendly with me. There is a friendly air around there.

Q. Do they seem at ease? A. Perfectly at ease.

Q. Is that what they call being called upon the carpet?

A. No, sir; not in my office.

Q. You spoke about the job and the union: Are there not things that every railroad man, in the operating department, may overlook or do in the course of a day's work, practically each day, that the company could get him on the technical violation of the rules, and discharge him?

A. I imagine the first part of your question is all right,

but the last part not.

Q. There is no technical violation of rules that you could discharge a man for? A. Oh, yes.

I mean, it happens in the work of every workman in

the handling of trains, and so forth?

A. They are perfectly human; they make errors.

Q. Is it the understanding of your men that on a matter of this kind they wouldn't be discharged for failure to [fol. 239] act in a matter of this kind, but on some other infraction of the rule, some other excuse?

A. Possibly more in the operating department. I

wouldn't know.

Q. You have not discussed these things with them over this period of years?

A. Well, yes, we have had cases in which questions have been discussed.

Mr. Noell: I believe that is all.

Mr. Davis: That is all."

Mr. Hay: Now, Mrs. Stewart, will you come back, please? Take the witness stand.

Oh, Your Honor, if I may, I would like to put on another witness who wishes to get away.

The Court: Very well.

ARTHUR STEWART, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, in rebuttal, as follows:

Direct Examination,

By Mr. Hay:

Q. State your name, Mr. Stewart, your full name.

A. Arthur T. Stewart, Salem, Illinois.

Q. Salem, Illinois. You are a brother of the deceased, [fol. 240] John Stewart? A. Yes, sir.

Q. You are younger, I presume.

A. I am younger, yes.

Q. Than your brother John.

The Court: Speak a little louder, Mr. Stewart, so that [they] jurors can all hear you.

Q. Now, Mr. Stewart, reference was made here to someone, I think a Mr. Reno, coming to see you to talk to you about the settlement of the case of Mrs. Stewart. Will you tell us what occurred in that connection?

Mr. Davis: Your Honor, may we object to the testimony of this witness on the same grounds that we objected to the testimony of Mrs. Stewart yesterday? I say, may we object to the testimony?

The Court: I do not know what your grounds were, I do not know whether they apply in this case or not.

Mr. Davis: Yes, I think they would.

Mr. Hay: May I say, before the gentleman makes the objection, we propose to follow up and show that Mr. Reno was acting in the interest and on behalf of Mr. Haun, the claim agent, in visiting this gentleman.

We will follow that up.

Mr. Davis: I am not making it on that ground. I am making it on the grounds that I made yesterday.

The Court: All right. State your objections. Go ahead, [fol. 241] make your objection now.

Mr. Davis: That this is a collateral attack on a judgment and order of the Probate Court of Illinois, that evidence cannot be adduced relative to fraud or duress—

The Court: Oh, yes. That objection may run to this, and it is overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Mr. Davis: Then we want to object further, Your Honor, as to some of this testimony on the ground that the testimony of this witness would neither show fraud nor duress.

Mr. Sheppard: And on the further ground, Your Honor, that there is no showing that the Southern Railway Company is bound by anything that a man named Reno did.

The Court: Of course, if Mr. Hay does not connect it up properly I will sustain a motion to strike it out.

Mr. Hay: Yes. We propose to show that before we are through, before the case is completed.

Q. All right. Go ahead and tell us what was said.

A. Well, he visited me three times.

Q. When was the first time?

A. The first time was along the 1st of October; the second time I would say along the last of October, the 24th [fol. 242] or 25th, something like that, I kept no dates because I did not feel at that time that it was necessary, and then the next time along the first days of November, I would say about a week or a little more from the second visit.

Q. What did he say to you?

Well, the first visit he introduced himself and told me that he wanted to talk to me in regard to the mishap of my brother, who was killed on this Southern Railroad, that he was helping and Mr. Haun had asked him to come and They had gotten my connection over-I worked with Pollock Lumber and Coal Company in Salem, and he come to talk to me to see if I could not be influential in getting my sister-in-law to settle with the Southern Railroad, that Mr. Haun had seen her and never been able to get a settlement, and he wanted me, he wanted me to help him in assisting to get her to settle, and that they would = give her five thousand dollars, but that they would not settle through the attorney she had; that if I would write a man by the name of Walter Stillwell at Hannibal, Missouri, he would come to Salem, and that I could get my sister-in-law to come there, and that he would get the five thousand dollars for her within four days' time; that Stillwell already knew all about the case, all I would have to do, write to him and he would come.

That was the first visit.

[fol. 243] Q. That was the first visit. What did he say to you the next time he came?

A. The second visit he came and it happened that he got there just the same day that my sister-in-law had come to Salem. I had not seen her in between the time, and I carried the message to her that he had given me.

Of course, I knew none of the makings up of the case up until that time, so I delivered the message to her that he had given to me, and, well, when they came into the house my wife called me to come down from the office, that my sister-in-law and her son and his daughter was at the house, and was going to leave right away, would not be

there but a few minutes. So I went down to the house, to see them, and delivered this message, and when I came back to the office in a little while, Mr. Reno came and I told him I had just delivered the message, and that they just left my house, and were headed for Hillsboro, and would be back in East St. Louis the next day, and he said he would try to see them then, and he laid the proposition to me again, what the Southern would do, Mr. Haun would give her this five thousand dollars, and it was a case that he was working in the interest of them, and that if she did not take that she would not get nothing.

[fol. 244] Q. Did you communicate what he said to Mrs. Stewart?

A. I communicated it to Mrs. Stewart, but did not take

no part in it.

Well, that, in about the, sometime during the first days of November, he came back to see me again. He said he had been to the house but he had not been able to see her, and that the daughter had treated him [cooly], and that he had come back to see if I could not take some hand in this, and I told him that I had carried the message, but if he wanted me to take pressure to bear, that I would not do it, because this woman was only a sister-in-law of mine, was not my mother, and that she had grown children, and if they seen fit to turn the offer down I would not have tried no pressure to either force her to take it or do nothing about it.

Q. Did I understand you to say that they would not have any dealings with the lawyer she had employed?

A. Oh, they would have me to write to Stillwell at Hannibal, Missouri, and Stillwell would come to Salem.

Q. Did you understand from that that this was a lawyer at Hannibal? A. Walter Stillwell, Hannibal, Missouri.

Q. Walter Stillwell, Hannibal, Missouri. Now, did anyone else come to see you?

[fol. 245] A. No, sir.

Q. I see. Well, that is all you know about the matter?
A. Yes, sir. I never wrote to Stillwell because I did not propose to take any active part in it.

Q. What is your business, Mr. Stewart?

A. I am manager of a retail lumber yard at Salem, Illinois, known as the Pollock Lumber and Coal Company, with head offices in St. Louis.

Q. Did you know this man Renow before!

A. Never seen him.

Q. You had never seen or heard of him?

A. He told me he talked to the sister-in-law a time of two, could not tell her his name at that time, I would say he had stated some business he was in that made it impossible for him to tell her his name, but now he was in some mutual insurance company, with offices in the Boatmen's Bank Building, and that he could tell me his name, and I would not be sure, I think he said it was Claude Renow, but anyway it was Renow, and left his card.

Mr. Hay: That is all.

Cross-Examination.

By Mr. Davis:

Q. Mr. Renow did not threaten you in any way, did he! A. No.

[fol. 246] Q. He just came up to you?

A. And asked me-

Q. And asked about the settlement?

A. No. He asked me to assist in getting her to take it.

Q. And you told him you would not do that?

- A. The third time, no, the first time I did not know whether it was best for her or worst for her. I simply took the message, but after I talked to her, which was the same day, the second time, you see, but when he talked to me the first time, I did not know anything about the facts because I was not in and out of East St. Louis very often. My business is there and I did not know whether the five thousand dollars, or any of the conditions, so I told him I would deliver the message when she came and seen me, and I delivered the message to her, and she told me that she would not take it. Then, of course, she told me various ones, Mr. Haun and all had been trying to get her to take it.
 - Q. Don't tell what she said.

A. Well, that is-

Q. You delivered the message to her?

A. I delivered the message.

Q. Now, Mr. Renow was polite to you, wasn't he?

A. Oh, yes, yes.

[fol. 247] Q. He was a gentleman to you?

A. Yes. He was in my office, he had to be.

He came to you as man to man? A. Which?

He came to you as man to man?

A. He came to me to lay his proposition, to ask me to assist him in getting her to settle. He said he was a friend of Mr. Haun's and was doing this because Mr. Hann had asked him to.

Q. And that is all he said, you say he did not threaten

you or do anything of that nature to you?

A. Oh, there would not be no occasion to do that.

There would be no occasion to do that. How long have you known Mrs. Stewart?

(No response.)

Q. How, long have you known Mrs. Stewart?

A. Mrs. Stewart? Well, I think that probably thirtyseven or thirty-eight years, something like that.

Q. And she has-

A. That is, you mean this Mrs. Stewart, that is John Stewart's widow?

Q. Yes, John Stewart's widow.

Thirty-seven or thirty-eight years. A.

She has always been an intelligent woman?

A. As far as I know.

Q. Well, you have seen her.

[fol. 248] A. I have seen her. I am no judge of that, but I never knew her to be adjudged insane or anything like that.

Well, she has always been normal, as far as you Q. could tell? A. Yes, sir.

Q. Is that true?

A. As far as I know, yes.

Now, did you tell her to study this out and do as she pleased? A. L surely did.

Q. You told her it was a matter for her?

A. She told me that she had already studied it out, the proposition had been presented to her a number of times by different people, that she said this Mr. Renow had been to see her, when I described him she said, "That is the fellow that came to see me that refused to tell his name."

Q. That is what she said? A. Yes.

Q. And you told her though to use her own judgment, do whatever she pleased about it, but she, you say, she refused to accept, was it five thousand dollars or less money?

A. Five thousand dollars at that time.

Q. She refused to accept it.

Mr. Davis: I think that is all.

Mr. Hay: That is all.

[fol. 249] HATTIE McKelvey, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, in rebuttal, as follows:

Direct Examination.

By Mr. Hay:

- Q. Your name, state your full name, Mrs. McKelvey, please. A. Hattie McKelvey.
 - Q. Where do you live?
 - A. Coulterville, Illinois.
 - Q. That is about how far from East St. Louis?
 - A. About fifty miles, I would say, approximately.
 - Q. Are you the niece of Mrs. Stewart?
 - A. Yes, sir.
- Q. Are you the niece to whom she referred, at whose home she was when certain gentlemen came to see her in connection with her case? A. Yes, sir.

Q. Were you at home at the time? A. Yes, sir.

Q. Will you tell just what occurred when this gentleman came? A. Well, he came—

Mr. Davis: Now, Your Honor, may we object to this testimony on the same ground that we objected to Mrs. Stewart's testimony that I have heretofore related to?

[fol. 250] The Court: Very well. The same objection, and overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. And by gentleman, I am referring to Mr. Haun.

A. Mr. Haun came to my house.

Q. When was that, Mrs. McKelvey?

A. Why, it was on April 20th.

Q. 1937 A. Yes, sir.

Q. All right. Just go ahead and tell us what occurred.

A. Well, he came to the house, and I not knowing him I called my aunt to the door. She had told me she hired an attorney. I thought that was who it was.

Mr. Davis: Don't state what you thought. Just state what you did.

A. Well, that is the facts, and I asked him in, and he said no, he would not come in. And he took her out in the car. It was a rainy day, and she sat out there all afterneon, and her being in the state she was in, I was worried about her.

Mr. Davis: Now, we object to that. Just state what happened, what he did.

A. Well, he kept her out there practically all afternoon, and I do not know what happened while he had her out there.

[fol. 251] Q. I understood you to say you invited him in the house? A. I did. He refused to come in.

Q. What was your aunt's condition at that time?

A. Well, she was very nervous, just very nervous. We came to East St. Louis—

Mr. Davis: That is a conclusion, your Honor. We ask that it be stricken out.

Mr. Hay: Whether or not one is nervous or not, I think is a question of fact.

The Court: The objection is overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

The Witness: We came up and got her, to take her out there to rest. We thought we would get her away from all of it.

Mr. Davis: Now, we ask that that be stricken out. Don't state—excuse me, may it please the Court.

The Court: If you will make a motion the Court will take care of it.

Mr. Davis: I move that it be stricken out.

The Court: What be stricken.

Mr. Davis: The last answer.

The Court: The last part of the answer as to what she thought, that may be stricken out.

[fol. 252] Mr. Davis: Yes.

The Court; Yes.

Q. Why did you take her down to your home?

Mr. Davis: I think that is a conclusion, why they took her down there is immaterial.

The Court: Sustained.

Q. Had you seen her up in East St. Louis?

A. Yes, sir.

Q. Had you been in East St. Louis when either Mr. Haun or this Mr. Renow had been around to see her?

A. No, sir.

Q. I see, but after she had remained up here for a while following the death of Mr. Stewart, you took her down to your home?

A. Yes, sir.

Q. How long had she been down there before Haun showed up down there?

A. I think it was the next day. It was not but just a

day or two, it was not more than two days, I know.

Q. Now, you say he kept her out in this car practically all afternoon? A. Yes, sir.

Mr. Davis: Now, wait a second. I object as to the form of the question, that he kept her out there.

[fol. 253] The Court: How?

Mr. Davis: I object to the form of the question, that he kept her out there.

The Court: Very well. Sustained.

Mr. Hay: I will change the form.

Q. I understood you to say that she was in the car and he was talking, they were in the car together practically all afternoon? A. Yes, sir. Q. Now, what was her condition when she returned from that car to your house?

A. Well, she had a nervous chill, at a couple of hours

after she came in.

Q. Where did she spend the night?

A. After she got reconciled enough we took her to Salem to talk to Mr. Stewart, and she stayed with another cousin of mine after we returned.

Q. And stayed at Coulterville? A. Yes, sir.

Q. With another relative?

A. Just a block or so from my house.

Q. Now, did you see Mr. Haun any more?

A. He was back the next morning.

Q. Did he see Mrs. Stewart the next morning?
[fol. 254] A. He did not see her, no. My cousin would not let him in the house. I went over there with him.

Q. Did you see your aunt that morning?

A. Yes, sir.

Q. What was her condition that morning?

·A. Well, she was just all worked up and crying, having one chill after another.

Mr. Hay: That is all.

Cross-Examination.

By Mr. Davis:

Q. Now, how many times did you see Mr. Haun?

A. I saw Mr. Haun three times.

Q. Now, when was the first time you saw him?

A. It was on April 20th.

Q. And when was the next time you saw him?

A. The 21st, the next day.

Q. And when was the next time you saw him?

A. Well, it was not but a few days, I do not know the exact date.

Q. Two or three days afterwards?

A. I think it was some week, I would not be positive, but it was not more than a week from that time.

Q. So the only times you saw Mr. Haun was in April?

A. Yes, sir.

Q. 19371

A. Until I came up here to the trial.

[fol. 255] Q. Yes, until you came to the trial. Now, he came there that first time at your home at Coulterville?

A. Yes, sir.

Q. And he asked for to see Mrs. Stewart?

A. Yes, sir.

Q. And Mrs. Stewart came out, did she?

A. Yes, sir.

Q.. And then he asked her if she would not go out and talk to him in the car?

A. He did.

- Q. And that is all that happened, was it? A. As far as I know. I was not out there.
- Q. As far as you know, and that is all that happened, and that is all that happened, and he merely asked her in a polite voice if she would not go out there, didn't he?

A. He told her he wanted to talk to her.

Q. He told her he wanted to talk to her?

A. Would she come out in the car.

Q. What was the word that he said?

A. I do not remember exactly.

Q. Did he say, "Mrs. Stewart, I would like to talk to you"!

- A. I think I walked back in the other room when he asked for her, and I do not know exactly, I asked him to come into the house. I said, "You can talk to her in the [fol. 256] front room." He said, "No, we will go out in the car."
 - Q. Then you went back on in the house?

A. Then I went back on in the house.

Q. Then, did you hear him ask her to go out in the car with him?

A. Only what he told me, that he would not come in, that they would go to the car.

Q. You did not hear him ask her to go to the car then?

A. I just said he would not come in. He said, "We will go out in the car and talk."

Q. He said it to you? A. Yes.

- Q. But you did not hear him ask Mrs. Stewart to go out?
 - A. Well, that was the same as asking her, wasn't it?

Q. No, I am asking you if you heard.

A. Why, certainly. He told me he would not come in, that they would go out in the car. Wasn't that asking her!

Q. Did Mrs. Stewart hear that?

A. Why, certainly. She was standing there.

Q. She was standing there?

A. Yes.

Q. And that is all that was said, "Mrs. Stewart, won't you go out in the car with me", something like that?

A. I won't say he said those exact words. He refused

to come in the room. That is all I know.

Q. What were his exact words, as well as you remem-

ber, that is what I want?

[fol. 257] A. Well, he came to the door and asked for Mrs. Stewart. He told me his name but I did not understand what it was, and I told her, we always called her Polly, "Aunt Polly", I said, "Aunt Polly, there is a man here to see you". I said, "I asked him in", and she went to the door, and she begin trembling as soon as she saw who it was, and I walked to the door with her, and I said, "Come on in the front room, you can talk in here." He said, "No, we will go out in the car and talk", and that is all I know about it.

Q. Was it—that was on the 20th? A. Yes, sir.

Q. That was on the 20th. Now, you did not hear Mr. Haun threaten Mrs. Stewart in any way?

A. Why, he did not threaten her, no, not that I know

of. I don't know why he would.

Q. And he did not threaten you at that time?

A. No. He had better not.

Q. I see. I see. Now, nobody else had better threaten

you! A. No, they better not.

Q. And then afterwards, after they got out in the automobile talking, what time was it when they went out there?

A. I could not say that, it was after dinner.

Q. You mean, you call 12:00 or 1:00 o'clock dinner?

A. Yes, sir. Country towns always do.

Q. That is the way I was raised, we call it dinner. And [fol. 258] it was after that? A. Yes, sir.

Q. Now, can you recall just about the time?

A. No. I would not make no attempt to, but I know she was out in the car a couple hours.

Q. A couple hours? A. At least that long.

Q. And your best recollection, to your best recollection she was out there a couple hours? A. Yes, sir.

Q. Talking to him. And after that she came on in to the house, did she?

A. She came in and went to bed.

Q. And Mr. Hann drove away? A. Yes, sir.

Q. Now, when was the next time—now, that same night, Mrs. Stewart drove to Salem, did she not?

A. Yes, after she laid down a couple hours and got composed, we took her to Salem.

Q. How far is it from Coulterville to Salem?

A. I judge it is sixty miles, but we stopped in Centralia a while, and she rested.

Q. That is sixty miles? A. Sixty or seventy.

Q. Where is Coulterville in Illinois?

A. Randolph County.

Q. I know, but is it the Southern part?

A. The Southern part.

[fol. 259] Q. What is that? A. The Southern part.

Q. Where is Salem, what county? A. Marion. Q. Marion County, that is about sixty miles?

A. I judge it is.

Q. And who went over there with her?

A. Yes, sir. Yes, sir, I was with her.

Q. Did you drive? A. No. My cousin drove.

Q. Your cousin drove the machine. And then she went over to another cousin's in Salem, that was the one who drove?

A. No. She went to Mrs. Stewart's in Salem, the one that was just on the stand.

Q. And she stayed at Mr. Stewart's that night?

A. No. We went back after an hour or so. Q. Went back to Coulterville? A. Yes, sir.

Q. After talking to Mr. Stewart you went back to Coulterville that night? A. Yes, sir.

Q. So then she drove—what time did you leave for

Salem that afternoon?

A. Oh, we left, I judge in an hour after Mr. Haun left, we went to Salem.

Q. And what time did you get to Salem, do you know!

A. No, I do not.

Q. How long did it take you to drive there?

A. I do not remember that, either.

[fol. 260] Q. And then when did you start back that night, do you know? A. We started back after midnight.

Q. After midnight, and then Mrs. Stewart drove with you back to Coulterville? A. Yes, sir.

Q. After midnight, so that day, why she drove 120 miles, that is about eight hours, would you say, or ten hours?

A. Well, I don't know just how many hours it was. 'I

know-

Q. But anyway, it was-you started after midnight?

A. We went back home after midnight.

Q. Yes, after midnight? A. Yes.

Q. That was then the morning of the 21st?

A. I suppose it was.

Q. About what time did you start, do you know?

- A. Why, I just got through telling you that we left in the afternoon.
- Q. I know, but to start back, I mean, you say after midnight. Do you know when it was after midnight?

A. No, I do not.

Q. You do not know when it was. Now, you say you saw Mr. Haun once more, twice more?

A. He was back at the house the next morning.

Q. He was back at the house the next morning, and he did not see Mrs. Stewart the next morning?

[fol. 261] A. No, only just talked to her from the front door into my cousin's bedroom.

Q. He spoke to her there, and he said, "Mrs. Stewart, I see you are not feeling well. I won't stay", or something

like that? A. "I will come back."

Q. Ma'am? A. "I will be back".

Q. I see, he said, "I see you are not feeling well this morning and I will be back." A. Yes.

Q. Now, when was the next time you saw him?

- A. Just in a day or so. I do not know just exactly, but it was all within one week.
 - Q. And where was that?

A. He came to my house.

- Q. And was Mrs. Stewart there?
- A. She was not there.
- Q. She was not there?
- A. She had come back to East St. Louis.
- Q. He asked you if she was there A. He did.
- Q. And you told him she was not there? A. I did.
- Q. And he did not threaten you in any manner at any time? A. I do not know why the man should threaten.

Q. But I say, he did not do it? [fol. 262] A. No.

Q. And he was polite to you, all the time, wasn't he?

A. Yes.

Q. Acted as a gentleman?

A. The third time he came back he was telling us that he would absolutely have no dealings with Mr. Noell, the railroad company would spend ten thousand dollars rather than let him take the case.

Q. That the railroad would spend ten thousand dollars

rather than let Mr. Noell have the case?

A. That is what he said in my kitchen, right in the presence of my husband.

Q. You do not know whether they had cause for that or

not, do you?

A. No, I do not know nothing about the railroad company.

Mr. Davis: That is all.

Mr. Hay: That is all.

(Witness excused.)

Mr. Hay: Your Honor please, I think it will not be possible for us to finish with Mrs. Stewart this morning.

(Here ensued a colloquy between the Court and counsel out of the hearing of the jury, and off the record.)

The Court: You may announce that all parties and witnesses and jurors in the case on trial will be excused until Monday morning at 10:00 o'clock.

[fol. 263] At this point, 12:30 P. M., Saturday, June 10, 1939, an adjournment was had until Monday, June 12, 1939, at 10:00 A. M.

Pursuant to the said adjournment, the Court convened at 10:00 o'clock A. M., Monday, June 12; 1939, and the following proceedings were had:

The Court: Proceed, Gentlemen.

Mr. Davis: In order to save the examination of this witness, Mr. Harding, I will admit on December 6, 1937,

Mrs. Stewart tendered back five thousand dollars to Mr. Wiechert, for the Southern Railway Company.

Mr. Noell: With ten dollars added as interest, since the check did not clear until the 6th of December, 1937. It cleared on that date, having gone to Washington, D. C. and back and there was ten dollars added for that six days' interest, that took the time for the check to clear.

Mr. Davis: Is that true, Mr. Wiechert?

Mr. Wiechert: I did not count the money.

Mr. Davis: Well, I haven't any objection to that. They tendered the money back.

The Court: What?

Mr. Davis: I haven't any objection to that. They ten-[fol. 264] dered the money back.

Mrs. Mary Stewart, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further on behalf of the plaintiff, in rebuttal, as follows:

Direct Examination.

By Mr. Hay:

Q. Mrs. Stewart, I want to ask you one or two questions on matters that I asked you about when you were on the stand the other day, just as preliminary.

What is the name of the gentleman that you state came to see you in Kentucky?

A. His name was Hanley, known as Blond Hanley, an attorney.

Q. How many times do you say that Mr. Renow came

to see you?

A. He came to see me twice, but he came to see my

daughter twice, I mean four times.

Q. I believe you stated in your testimony the other day that the last time you talked to Mr. Haun, the claim agent of the Southern, was down at Coulterville.

A. Coulterville.

Q. In April of 19371 A. Yes, sir.

It was after that that you went down in Kentucky?

A. After that?

[fol. 265] Q. Yes. A. Yes.

Q. And it was after that that you had a talk with your brother-in-law, Mr. Arthur Stewart? A. Yes, sir.

Q. Was it also after that that Mr. Renow came to see

yout

A. Yes, sir. He came to see if I had gotten home yet.

Q. Now, Mrs. Stewart, in this talk with Mr. Haun down at Coulterville, my recollection is that you stated that the amount that he offered you at that time was four thousand dollars? A. Four thousand dollars.

Q. Did the gentleman down in Kentucky, Hanley, make

an offer to you?

Mr. Sheppard: We object to that.

The Witness: \$4,500.

Mr. Sheppard: We object to that, Your Honor. The witness answered while we were objecting, and therefore we will ask to move to strike.

The Court: Sustained.

Mr. Sheppard: For the reason that there is no showing that he represented anybody connected with the defendant in this case.

Mr. Hay: We will follow that testimony, showing that he did act at the instance of Mr. Haun.

[fol. 266] The Court: Very well, proceed.

Q. What offer did he make you, Mr. Hanley?

A. \$4,500.

The Court: That is admitted on your promise to connect it up.

Mr. Hay: And if we are unable to do that, we will consent that it be stricken.

Q. \$4,500! A. \$4,500.

Q. Now, when was the first time that you heard of the willingness of Mr. Haun or anyone else representing the Southern to pay \$5,000?

A. My brother-in-law said Mr. Renow made that state-

ment to him.

Q. That was in October, was it not? A. In October.

Q. You heard the testimony of Mr. Stewart about communicating to you what had been said to him by Mr. Renow! A. Yes, sir.

Q. That was correct, was it? A. Yes, sir.

He did communicate what had been said?

What had been said. A.

What had been said as represented by Mr. Renow. That was in October.

Now, to refresh our memories, you received a telegram which was, or rather a telegram to Mr. Hamm was transmitted to you, which was under date of-I want to get that [fol: 267] date if I may. November 23, 1937?

A. Correct.

Q. Now, when you learned about this telegram where

were you? A. At Castleton, Illinois.

Q. Castleton, Illinois. And from or through whom did you learn of this message from Mr. Haufh to Mr. Hamm?

My son-in-law and his wife, my daughter.

Q. Mr. and Mrs. Hamm? A. Yes, sir. Q. Where did you see them?

A. At their home in East St. Louis.

Q. Does that mean that you came from Castleton to their home? A. To their home.

Q. Upon receipt of this message? A. Yes, sir.

Q. Now, did you learn from Mr. Hamm that he had had a talk with Mr. - A. Mr. Howell.

Q. Mr. Howell? A. Yes, sir. He had been called to the office.

Q. What did Mr. Hamm say to you?

Mr. Davis: Now, we object to that, Your Honor. We are not bound by anything that Mr. Hamm said.

Mr. Sheppard: It is hearsay besides.

The Court: Overruled.

[fol. 268] To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Mr. Davis: And it is hearsay, besides it is self-serving.

Mr. Hay: I do not see or think that it needs any argument to show the admissibility of this, Your Honor. Mr. Hamm had been called in as testified to by Mr. Howell, for

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the express purpose of having him see if he could not accomplish a settlement of this case, and pursuant to that—

The Court: I passed on it. Go ahead.

Mr. Hay: I beg your pardon.

Q. What did Mr. Hamm say?

A. They had called him to the office to see Mr. Howell, and Mr. Howell asked him about this case. He said he did not know there were a case of that kind.

Q. That Mr. Howell said he did not know?

A. No, not until he told him, and he said that he had been notified to see if he could not urge the case along, and get me to take that amount of money, and he said he did not know him, and he did not want to, you know, to urge him, but he said just to see if he could not talk me into taking that amount, and then he told him to go and talk to Mr. Campbell.

Q. Did he say he had talked to Mr. Campbell?

A. He had to, yes. He said, "You go, I would advise you to go".

[fol. 269] Q. What else did Mr. Hamm say?

A. Well, it meant his job, so he better go.

Mr. Davis: He said what?

A It meant his job, and he had better go.

Q. And what did he say to you with respect to the settlement of the case, Mr. Hamm I am referring to?

A. Well, he said that he would not get it through the attorney, and that that might mean his job, and I better go see, he better go see the attorney, Mr. Campbell.

Q. Well; what effect did that have on you?

Mr. Davis: Well, we object to any effect it had on her.

Mr. Hay: That is the whole gist of this case, Your Honor.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

A. Well, Mr. Hamm said that they was not hiring men his age, or from his age to thirty years, and he might lose his job. Q. Well, what did you say, or what was the effect on

you?

A. Well, I knew he had been working for the company a long time, and if he would lose his job he might not get another one, and he had a family, a wife and two children to keep.

[fol. 270] Q. Now, up to that time, Mrs. Stewart, had you ever indicated to anybody anywhere that you would

take five thousand dollars?

A. No time.

Q. After Mr. Hamm told you that, what was your atti-

tude toward the taking of the five thousand dollars.

A. Well, I was very worried, and at the time I thought well, he, if he would lose his job, they would suffer, and that is what I told him, that he would lose his job, he might not get any more, and I was told by Mr. Wiechert, that it had been done, he could lose his job.

Q. I see. Was that after you had-

A. After I had the talk with Mr. Hamm and went to

Mr. Campbell's.

Q. Oh, I see. Now, pursuant to this talk with Mr. Hamm, you then went to the office of Campbell & Wiechert?

A. Yes, sir.

Q. And you say that at that time Mr. Wiechert said to you, when reference was made to the possibility of Mr. Hamm losing his job, that that had been done?

A. It had been done, it could be done and it had been

done.

- Q. Who was present when that conversation took place?
 A. Well, my daughter and Mr. Felsen, and I think Mr. Haun.
 - Q. Felsen, is that the lawyer that-

A. That was the attorney.

[fol. 271] Q. That Mr. Campbell called in to-

A. Yes, sir.

Q: Just a moment. Mr. Felsen, is that the lawyer that Mr. Campbell called in to represent you? A. Yes, sir.

Q. And this took place in the office of Campbell & Wiechert, the attorneys for the Southern Railroad Company? A. Yes, sir.

Q. Had you ever been in that office before! A. Never.

Q. Had you ever seen either Campbell or Wiechert

A. I had seen Mr.—no, I don't think I had seen Mr. Wiechert. I see Mr. Felsen, but not Mr. Wiechert.

Q. Mr. Felsen, you mean, came to see you with a Mrs. Pouch? A. Yes, sir.

Q. Before you hired a lawyer, is that right?

A. Yes, sir.

Q. All right. Now, after these conversations with Mr. Hamm and with Mr. Wiechert, what did you do? A. How!

Q. What did you do after these conversations with Mr. Hamm and Mr. Wiechert, I mean with respect to agreeing to take five thousand dollars?

A. Well, I was just to where I did not know what to do, [fol. 272] and the more I studied, I thought of those children that would suffer, you know, and if he would lose his job I knew they would suffer, and I took the money.

Q. You took the money?

A. When he said I would get it no other way.

Q. Now, it was after these converations? A. Yes, sir.

Q. That all these papers were-

A. Were made out when I got there.

Q. May I ask, were the papers already made out when you got there? A. Yes, sir.

Q. But it was after that that you agreed to take the money, and then went over to Belleville and went through the form of a settlement?

A. Yes, sir.

Q. I see. And it was after that that you signed the release, was it? A. Yes, sir.

Q. Up to that time had you signed anything in connection with the settlement?

A. I don't think I had.

Q. Had you agreed with anybody to take five thousand dollars until after the talk with Mr. Hamm and Mr. Wiechert? A. No. sir.

Q. Had you ever indicated to anybody that you would

[fol. 273] take five thousand dollars? A. No, sir.

Q. Was five thousand dollars as much as you thought you ought to have?

A. Why, certainly not.

Q. The doctor was on the stand yesterday, and he testified that you had said to him when he came into the hospital to see your husband, that he had been on a drunk for three

or four days.

A. I do not see how he could be on a drunk when we hunted a house and moved, and straightened our things. A man drunk could not do that, I don't think.

Q. Did you make any such statement as that, to the ef-

fect-

A. No, sir.

Q. Did you ever make a statement to him about his being drunk any time, make the statement to this doctor?

A. No, sir.

Q. Did you ever make a statement to him?

A. No, sir.

Q. Your husband did drink liquor?

A. Oh, about like ordinarily a man would drink.

Q. Do you know of any time of his being what you would call drunk?

A. I never seen him when he could not get around or do anything he wanted to do at no time.

Q. He worked, as you testified before, fairly regularly,

[fol. 274] did he not?

A. Regular, yes, sir.

Q. I believe something during the year before he was

killed he had something like poison ivy on him?

A. Well, Doctor Thie at the Missouri Pacific [—] something known as a child disease or breaking out. I had it first on my hand, and I went to the doctor, and he gave me a prescription, and I went back for him.

Q. Was that during the last year of his life?

A. Yes, sir, the summer before.

Q. Did he lose some time as a result of that?

A. Yes, sir.

Q. Now, in the years before that, had he lost any time on account of such a thing as that ivy, mentioned?

A. Well, he had been a steady worker.

Q. I see. A. Yes, sir.

Q. And I believe you testified that he turned over, ordinarily turned over his pay check to you?

A. Yes, sir.

Q. And out of that you were supported and the family was supported?

A. Yes, sir.

Q. I mean you and he were living together?

A. Yes, sir.

Q. Now, you say that during the years preceding this last year when he had this trouble, you say he worked steadily?

[fol. 275] A. Yes, sir.

Q. Would you say he worked more or less steadily or

otherwise than the last year of his life?

A. Sure, he has worked of course not the last year or two, but he has worked most every day. But the last year or two he figured that he should give some of the other men a break several days at a time.

Q. And when he laid off the extra man would get the

opportunity to work? A. Sure.

Q. I believe you stated that at the time of his death he was in good health?

A. Yes, sir. He was never sickly, he was never a sickly man at no time.

Mr. Hay: That is all.

Mr. Sheppard: Your Honor, just to keep our record straight, may we move to strike all the testimony with respect to what her son-in-law, Hamm, told her, first for the reason that it is hearsay; second, for the reason that there is no evidence showing that he had any authority to speak on behalf of the defendant in this case; and third, that it does not tend to prove any issue of fraud or duress.

The Court: Overruled.

Mr. Sheppard: Save an exception.

[fol. 276] To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Cross-Examination.

By Mr. Davis:

Q. Now, Mrs. Stewart, in February, the only month of February, 1907—wait a minute. I mean 1937, he was injured on the 12th day of February, 1937?

A. About that time.

Q. Yes. Well, that was the date, wasn't it?

- A. Well, I won't say for sure, but it was about that time.
- Q. About that time; and during that time he got twentyfour dollars, so the record shows.

A. Well, not having to remember, I don't remember that.

Q. I say, the record shows that.

A. Yes, sir.

Q. Now, how much did he get a day, six dollars and something, wasn't it?

A. Yes, sir.

Q. Six dollars and something a day. Therefore, if that is what he got he did not work over four days during that month of February, 1937?

A. Well, if he got injured he could not work.

Q. I know, but I say from the 1st to the 12th, the day of his injury he only worked four days if he got twenty-four dollars?

[fol. 277] A. Yes, sir.

Q. Not over four days. Now, you say that you moved during that time?

A. Yes, sir.

Q. And you moved from the one place around the corner?

A. Yes, sir.

Q. And you said you did not have any furniture!

A. We did not, but you don't get just what you really need when you rent furnished rooms.

Q. But anyway, you did move around the corner. Now,

what did you take?

A. Well, I could not take—took things I needed in my work.

Q. You took your clothing from the place you moved from, didn't you?

A. Yes, but you have to have other things besides clothing to keep house.

Q. What other things did you take?

- A. I could not tell you that; suitcases and box and trunks.
 - Q. Did you move any furniture?

A. Yes, sir.

Q. Now, how did you move them, with a van?

A. We did not need a van because we had two or three men to help carry those things, the heavy things that he could not carry.

[fol. 278] Q. Now, how many trunks did you have?

A. Well, several trunks, several suitcases.

Q. Now, what do you mean by several?

A. Well, several would mean more than one or two.

Q. Well, you had three or four?

A. I judge four.

Q. And were your clothings in a trunk?

A. Some in a trunk, some in suitcases and some in boxes.

Q. Now, how many suitcases did you have?

A. We had four.

Q. Four suitcases, and how many boxes did you have!

A. Why, I am not supposed to remember all the boxes you have when you move.

Q. Just to the best of your recollection, how many

boxes did you have?

A. I could not tell you exactly.

Mr. Hay: Give him your best recollection; he seems to want to know.

- Q. Did you have one? A. Probably eight or ten.
- Q. Now, how far was it that you moved?

A. Two blocks.

Q. Two blocks, and you carried all those by hand?

A. Yes, sir.

Q. And the men carried them all by hand?

A. Well, the men carried the radio, and things that he [fol. 279] could not carry.

Q. By hand. Now, how long did it take you to move!

A. Well, we was all day moving and part of the day, and the next.

Q. Therefore, you were moving two days?

A. And we were looking for rooms.

Q. I know, but you were moving those two days, were you?

A. Yes, sir.

Q. And it took you two days, to carry those?

A. We did not have to hurry.

Q. I know you did not have to hurry, but it took you just two days to move?

A. Yes, sir.

Q. Now, Mrs. Stewart, you and Mr. Stewart were separated, were you not?

A. A short time, yes, sir.

Q. When was that?

A. Well, that was about, from about '28.

Q. '28 to what?

A. Well, these—we was separated about four years and a half.

Q. About four years and a half. And that was from about 1928 to 1932 or 1933, somewhere in there?

A. Yes, sir.

Q. Now, when was it that you were in Kentucky? [fol. 280] A. In Kentucky?

Q. Yes.

A. I went there in, let's see, it was in April.

Q. April, 1937 A. Yes, sir.

Q. And when was it that you saw Mr. Stewart, that he told you what Mr. Renow said?

A. In October, I think it was in October.

Q. In October you saw Mr. Stewart then, and he told you what Mr. Renow said in October; and when was it that you got this telegram from Castleton, Illinois?

A. That was in November.

Q. November. May I see that telegram?

(Mr. Noell hands the telegram to Mr. Davis.)

Q. That telegram is from Mr. Haun, isn't it?

A. Yes, sir.

Q. And all Mr. Haun said was "Mr. Campbell suggests that you and Mrs. Stewart"—this is to Henry Hamm?

A. Yes, sir.

Q. "Mr. Campbell suggests that you and Mrs. Stewart be at my office 3:30 to 4:00 Thursday. Important."

A. Yes, sir.

Q. And that is all it said? A. That was enough.

Q. Well, he just suggested that you come?

A. Yes, sir.

[fol. 281] Q. Now, just repeat again what Mr. Hamm told you that Judge Howell said.

A. Well, when he went up there he wanted to know why he was called up there.

Q. Yes. He told you this, did he?

A. Yes, sir, that, naturally he would be uneasy or wonder why he was called, he did not know whether he had done anything or not, you know, and so he told him that, or he asked him, he was talking about this, about me being the widow, you know, I had lost my husband, and he said well, he did not know anything about that, and he said he was asking him to come up, that was the first he knew when he was asked to come up here, and he told him that he was advised, wanted him to kind of talk to him, advised him to go and see Mr. Campbell.

Q. Advised him to go and see Mr. Campbell?

A. Yes.

Q. And that is all he told you, was it?

A. No. He told him that he had been working there quite a while, and he thought it would be best for him to go and see him.

Q. It would be best for him to go and see Mr. Camp-

bell? A. Yes.

Q. And that is all he said?

A. On account, he said, that they had wanted him to [fol. 282] settle that case.

Q. Who wanted him to settle it?

A. The company wanted Henry to see about me settling the case, and see if he could not talk me in—

Q. What company?

A. The Southern, he would like to see if he could not talk me into taking the stipulated amount.

Q. Mr. Hamm told you that?

A. Yes, sir.

Q. Now, you said a while ago that Judge Howell said he did not urge you to do it.

A. He told him he had known him a long time, and he

thought that he should go see him.

Q. That he should go see him? A. Yes. Q. But he could go or not as he wanted?

A. Yes, but he thought it would be best.

Q. He thought it would be best if he did go and see him!

A. Yes, sir.

Q. And that is all Mr. Hamm told you?

A. No. He told me that he might lose his job if he did not push the case, they wanted him to push the case.

Q. He did not say Judge Howell told him that, did he!

A. No.

Q. No.

A. But he was uneasy because he knew he would not have called him up there if he had not wanted him to do [fol. 283] that, because there was a card there from Mr. Hann, that he should go see Mr. Campbell.

Q. But Judge Howell did not tell—Mr. Hamm did not tell you that Judge Howell said he would lose his job if

he did not go ?

A. No, but he said he had been working there a long time, he would advise him to go.

Q. He advised him to go and see Mr. Campbell?

A. Yes, sir.

Q. And to see whether or not a settlement could be made?

A. Yes. They wanted him to see if he could not influ-

ence me in taking-

Q. He said that Judge Howell, Mr. Hamm said Judge Howell said that—did Mr. Hamm just tell you that?

A. Mr. Hamm told me that.

Q. But he did not say that Judge Howell said that?

A. No, but he said that Mr. Howell said that he was, that he wanted him to go and see Mr. Campbell.

Q. Did he tell you that he called up Mr. Campbell while

he was there?

A. No. He said he had, Mr. Howell was notified for him to call him over there and talk to him.

Q. And that is all that was said during that time that he told you that Judge Howell said?

A. Yes. You have Mr. Howell's statement.

[fol. 284] Mr. Davis: May I get a drink, Your Honor?

(A short pause.)

Q. Then, whatever Mr. Hamm said to you about it, it might mean his job, he was just surmising that?

A. No. He was worried about his job.

- Q. But I say, it was not because Judge Howell told him that?
- A. Well, he would not have been worried if he had not been called to the office.
- Q. I know, but Judge Howell did not tell him he might lose his job, as he told you?
 - A. Well, he had been working there a long time.

Q. No. You are not answering my question. I say, Mr. Hamm did not tell you that Judge Howell said that he might lose his job?

A. (No response.)

- Q. Well, you said he did not say that. Now, how old is Mr. Hamm?
 - A. About thirty, somewhere near thirty at the present.
- Q. Now, the last time you saw Mr. Haun was about April 20th? A. Before that?

Q. Yes. A. Yes. sir.

Q. Before that, April 20th? A. Yes, sir.

Q. And then you did not see him again until November 30th? A. No.

[fol. 285] Q. And you saw him then in Mr. Campbell's or Mr. Wiechert's office? A. Mr. Wiechert's office.

Q. Who is Mr. Barrett?

A. Mr. Barrett, well, that is the man that runs, that sells hot tamales. He has a factory.

Q. He has a factory; what kin is he to you?

A. Well, he is no relation of mine, but he married a sister to my son-in-law.

Q. Now, did Mr. Hamm come and tell you anything

about settling-I mean Mr. Barrett?

A. No, but he told his mother-in-law, and they were all very worried that Henry would lose his job.

Q. They were worried?

A. If he did not push the case.

Q. And why?

A. Because they knew he had a wife and children to support.

Q. They knew, didn't they, that Mr. Hamm had gotten a

pass for you, hadn't he?

A. Well, he had got a pass, yes, because I was living with them at the time. He was entitled to that.

Q. I know he was entitled to it, but Mr. Barrett was worrying over the fact that he had got a pass for you, wasn't he?

A. Oh, I don't know what he was worried about, but his wife's family were worried because they were afraid his children would suffer if he lost his job.

[fol. 286] Q. Didn't his family tell you that Mr. Barrett said that Mr. Hamm might lose his job because you had gotten a pass?

A. I do not remember anything about that.

Q. Because Mr. Hamm got you a pass, that is true, isn't it?

A. I do not know if he worried about the pass, but I know the family were worried for fear he would lose his

Q. Mr. Barrett told you, didn't he, that Mr. Hamm might lose his job because he had gotten a pass for you, or

his mother told you, or some of his family?

A. Mr. Barrett did not talk to me.

Q. Well, his mother came and talked to you?

A. His mother did not say anything about the pass. Q. His mother did not say anything about the pass?

A. His mother-in-law did not, no. They were worried about him losing his job.

Q. Did that influence you in any way?

A. It worried me, if he would lose his job.

Q. What I say, what Mr. Barrett's mother told you, did that influence you in any way?

A. Why, naturally it would, if she was afraid that her

son would lose his job, and his family would suffer.

Q. Well, you knew that he was worried because he had gotten a pass for you, didn't he? [fol. 287] A. No, I do not know that that worried him. He was worried because they wanted him to push the case.

Q. Is Hamm still working for the Terminal Railroad?

A. He is.

Q. He works every day, doesn't he? A. He is.

Q. Did Mr. Barrett's mother tell you that the family was worrying about losing his job, and that—

Mr. Hay: What are you reading from?

Mr. Davis: I am reading from the testimony. (Continuing) and that he was worrying because—

Mr. Hay: Page 103?

Q. Because Henry got a pass for his mother-in-law, who has a suit against the Southern, and could he get into trouble doing that, that is, he asked a certain gentleman if he could get in trouble doing that, didn't he?

A. I don't remember that.

Q. You do not remember that? A. No.

Q. And that this gentleman said "No, sir, if his motherin-law was living with him and relying on him for support he would not get into trouble", that was not told to you!

A. I do not remember that.

Q. You do not remember that. Now, did Mr. Hamm also tell you that at the time he was talking to you, that Judge Howell had told him that if Bruce Campbell said [fol. 288] that you would get this five thousand dollars net, that you would get it?

A. Yes, but I had not told them I wanted that.

Q. I know, but did he tell you that, didn't he?

A. Yes.

Q. Mr. Hamm told you that Judge Howell said if Bruce Campbell said you would get five thousand dollars net, you would get it, and if Mr. Noell had any attorney's fees, they would take care of it? A. Yes.

Q. He told you that?

A. He also told him I could pay him everything I got, it was nothing to him.

Q. You could pay Mr. Noell everything you got?

A. Yes.

Q. But he told you he would take care of any attorney's fees Mr. Noell might have, didn't he?

A. Yes, he did.

Q. Mr. Hamm told you that?

A. Well, I don't remember him telling me that. He may have told me.

Q. Well, who told you that?

A. Who told me that?

Q. Yes. A. Mr. Wiechert told me that.

Q. Mr. Wiechert told you that? A. Yes, sir.

Q. That they would take care of any attorney's fees that Mr. Noell might have? A. Yes, sir. [fol. 289] Q. Now, when you went to Mr.—I believe they

pronounce that Mr. Weechert's office?

A. Well, Weechert or Wiechert, any way you want to

pronounce it.

Q. Yes. When you went over to his office, what time in the morning did you get there?

A. Well, I don't remember now. I judge about 10:00

o'clock.

Q. About 10:00 o'clock?

A. Half past nine, something like that.

Q. And when you got there they had all the papers prepared? A. Yes, sir.

Q. And did you have a discussion with him, talk with

him? A. I answered his questions.

Q. Well, you answered his questions. And did he tell you that he was willing to pay you five thousand dollars?

. He told me they had the amount ready for me. He

showed me the papers.

Q. Did they tell you that Mr. Hamm told them at that time that when he left there, that you were willing to settle for five thousand dollars?

A. No. I had not made my mind to sign.

Q. You had not made your mind to sign? A. No.

Q. When did you make your mind?

A. When they told me that he could lose his job, and it had been done.

[fol. 290] Q. Told you he could lose his job, and that is all they said to you, was it?

A. He said it had been done.

Q. He could lose his job and it had been done?

A. Yes.

Q. Now, who said that to you? A. Mr. Wiechert.

Q. Mr. Wiechert? A. Yes, sir.

Q. Mr. Hamm did not tell you that Judge Howell said that, as you said?

A. No. Mr. Howell knew that he was running himself

liable if he did not.

Q. Mr. Hamm and you both knew that under the Brotherhood rules that they could not discharge Mr. Hamm for anything of this nature, didn't you?

Mr. Hay: I object to any testimony about her knowledge of Brotherhood rules.

Mr. Davis: I am asking her.

The Court: She may answer.

The Witness: They can get demerits for enough months that they are so indebted they never get out.

Q. Has Mr. Hamm got any demerits?

A. So far he has not.

Q. So far he has not. And he has not had any in the last two years, has he?

A He did not know at that time that he would not get [fol. 291] any. And you knew that they could not discharge him because he had seniority, didn't you?

A. I can tell you, he could get demerits for very many

months that-

Q. And you knew.

Mr. Hay: Just a moment.

The Court: Let her finish her answer, Judge.

Mr. Davis: Yes.

Q. And you knew, didn't you, that he could take this up with the Railroad Labor Relations Board, didn't you?

A. He could, but that is not saying anything about the

time he might be off during that time.

Q. Well, you knew if he was put off when he ought not to have been, that he could have gotten his back pay and reinstated, didn't you?

A. Well, that didn't keep us from worrying.

Q. That did not keep you from worrying. But you knew all that, didn't you?

A. At the time I never give it a thought.

Q. But you did know it? .

A. I do not know if I did or not.

Q. You do not know whether you did or not?

The Court: Are you familiar with all the rules of the Brotherhood?

[fol. 292] A. No, sir, I have no need to keep that in mind.

By the Court:

Q. Have you ever read them?

A. No, sir, I had no occasion to read them. If I had been a railroad man I might have stayed up nights studying them.

Q. Now, you say Mr. Stewart laid off because he figured

he would give some men a break? A. Yes, sir.

Q. Laid off for that reason alone?

A. Well, probably he had some business to transact.

Q. Well, if he had some business to transact then it was not to give the men a break?

A. Well, I could transact something, I presume, if he

did not want to lay off to do it himself.

.Q. Now, you have always been a normal person, haven't you, Mrs. Stewart?

A. I have never been to the asylum, or had anybody to

watch me, or anything.

Q. I say, you have been a normal person?

A. Never been sickly, or anything.

Q. And you are a person of good intelligence, aren't you?

A. Well, I don't know. I have always been able to get

around by myself.

Q. Always been able to transact your business?

[fol. 293] A. Yes, sir.

Q. Now, what else took place in Mr. Wiechert's office when you were there on November 30th?

A. What do you mean?

Q. What other conversation was had?

A. Well, I could not say:

Q. You could not say; the only thing that you remember about that conversation is that he said that he could lose his job, and it had been done? A. Yes, sir.

Q. And that is the only thing that was said.

Mr. Hay: Oh, she did not say anything of the kind.

Q. That you remember?

A. Oh, I would not exactly say that, no.

Q. Well, what else do you remember?

- A. Well, we sat there quite a while waiting for Mr. Haun and for Mr. Felsen, and I could not tell you just what was said.
- Q. Well, you got there, you say about 10:00 o'clock, and when did Mr. Haun come in?

A. We may have got there before that, half past nine, or something like that, I don't just remember.

Q. Well, how long before Mr. Haun came in after you got there! A. Oh, several minutes.

[fol. 294] Q. Several minutes. What do you mean by several minutes, two or three or four or five?

A. I did not keep track of the minutes.

Q. You did not keep track of them. Now, did Mr. Haun or Mr. Wiechert tell you that Mr. Hamm could lose his job, it had been done in the presence of Mr. Haun?

A. I don't just know if Mr. Haun was there or not, but Mr. Felsen was there, and my son-in-law and my daughter.

Q. Well, who got there first, Mr. Haun or Mr. Felsen!

A. Mr. Haun, but Mr. Haun left first.

Q. Now, after you got through with that, you did not sign any papers there?

A. I do not remember if I did or not.

Q. Well, didn't you go over to the Probate Court and swear to it before the Probate Court?

A. Yes, sir.

Q. And you got in an automobile from Mr. Wiechert's effice and went over to the Probate Court, didn't you?

A. Yes, sir.

Q. And when you got to the Probate Court you read over all these papers, did you not?

A. There was one I don't remember reading.

- A. That was the one about Mr. Noell, where it told [fol. 295] about he paying me, Mr. Noell—

Q. Paying Mr. who?

A. Well, you read the one concerning Mr. Noell on there. There was one paper that I don't remember.

Q. That was filed over there? A. Yes.

Q. There isn't any paper in there about Mr. Noell.

A. No?

The Court: We will take a short recess.

(Recess, ten minutes)

Q. Mrs. Stewart, do you live with Mr. Hamm?

A. I am there at the present time, yes, sir.

Q. How long have you been there?

A. This last time I was there, say two weeks, three weeks.

Q. Three weeks? A. Yes, sir.

Q. And did you see Mr. Hamm this morning?

A. No, sir.

Q. You did not. When did you see him?

A. Last night.

Q. You saw him last night. Now, you said after Mr. Wiechert said that Mr. Hamm could lose his job and it had been done, how did that conversation happen to come up?

A. Well, he insisted on me settling the case and taking the said amount because they had instructed him to, and I [fol. 296] knew that if he did not—

O. Who instructed him to do that did he say?

A. Well, Mr. Campbell.

Q. Mr. Campbell instructed him to do that. Now, go

ahead and tell how it happened.

A. That they would like for him to push the case and see if he could not persuade me to take the said amount of five thousand dollars, and he knew that if he did not, it might mean that he would lose his job.

Q. That Mr. Wiechert would lose his job?

A. No. Mr. Hamm.

Q. And if he did not settle the case it might mean that Mr. Hamm would lose his job? A. Yes, sir.

Q. Mr. Wiechert said that?

A. Mr. Hamm said that he might lose his job.

Q. When did Mr. Hamm tell you he might lose his job?

A. He told me that a number of times.

Q. You mean before you went to the office that morn-

ing? A. Yes, sir, and my daughter said-

Q. No, I am talking about Mr. Wiechert, how did that conversation with Mr. Wiechert happen to come up when Mr. Wiechert told you he could lose his job, it had been done, how did that conversation happen to come up? [fol. 297] A. My daughter brought that up.

Q. Your daugther brought that up? A. Yes, sir.

Q. What did she say?

- A. She said, "Now, would he lose his job if he did not push the case?".
- Q. Now, who was there with you, went to the office with you at that time? A. Who went with me?

Q. Yes, sir. A. My son-in-law and my daughter.

Q. That is Mr. Hamm and Mrs. Hamm went there with you? A. Yes, sir.

Q. And your daughter brought that up, and said that, could Mr. Hamm lose his job? A. Yes, sir.

Q. And they said he could lose his job, it had been done?

A. He could lose his job, and it had been done, meaning other men had lost their job for that purpose.

Q. I am not asking you what it meant.

Mr. Davis: I ask that it be stricken out, Your Honor.

The Court: Sustained.

Mr. Hay: I think she should be entitled to state what it meant to her, Your Honor.

The Court: Overruled.

Mr. Davis: I did not catch Your Honor's ruling.

Mr. Sheppard: He sustained your motion.

[fol. 298] The Court: I sustained the motion.

Q. They did not say that Mr. Hamm would lose his job, was going to lose it, did he?

A. He said it could be done.

Q. It could be done? A. Yes, sir.

Q. Did Mrs. Hamm go down to Kramer, Campbell, Costello & Wiechert's office the day before to arrange for you being there, do you know?

A. They was called, they was called up there to help

settle the case.

Q. I know,

A. That is why the papers were made out.

Q. Did Mrs. Hamm go there the day before?
 A. Now, I could not say if she did or not.

Q. Now, as you stated, Mr. Hamm had this conversation with Judge Howell on November 23rd?

A. I do not just remember what day it was, but he had

been called up there. I was not there.

Q. I know you were not there, that was on the 23rd. Now, you were away at that time, weren't you?

A. Yes, I was away.

Q. And do you know whether Mrs. Hamm, during the —between the 23rd and the 30th went up to Kramer, Campbell, Costello & Wiechert's office?

A. Well, Mr. Campbell and Mr. Hamm had talked the

matter over.

[fol. 299] Q. Well, Mr. Campbell and—

A. And Mr. Hamm knew if he did not,-

Q. No.

A. That is what he told me, and that is how the papers come to be fixed up.

Q. Told you what, told you what?

A. That he was induced to get me to settle the case.

Q. That he was induced to get you to settle the case!

A. Yes, sir.

Q. That is what he told you, that he was induced to get

you to settle the case? A. To try to settle the case.

Q. And that was the meaning of his talking to you, that they induced you, that they were trying to get him to induce you to settle the case?

A. That if he did not he would lose his job, that was

the fear he had.

Q. That was the fear he had, but not from what anybody told him.

A. Well, if they had not talked to him in a manner to

make him afraid he would not be afraid.

Q. I am not asking you that. So while he told you he did not say that anybody else had told him that, did he?

A. Well, he had that fear himself without anybody

telling him.

Q. I know, he had that fear, but nobody told him that, [fol. 300] so far as he told you.

Mr. Davis: I think that is all.

Mr. Sheppard: She did not answer.

Mr. Davis: I know. She has already said that he did not, anyway.

Q. Your husband was, had been a railroad man since he was a young man, hadn't he? A. Yes, sir.

Q. And he talked to you about seniority rules, didn't

he?

- Sometimes, but I did not keep track of all the things he talked to me about. It did not concern me.
 - Q. But he did talk to you about them?

A. I presume he had.

- Wasn't he your husband; didn't it concern you to that extent?
- A. If it had been his case, it would, but other cases did not bother me.
 - Other cases did not bother you.

Mr. Davis: I think that is all.

Mr. Hay: Just two or three questions.

Redirect Examination.

By Mr. Hay:

Q. Mrs. Stewart, Mr. Hamm as has been indicated, is the husband of your daughter? A. Yes, sir. [fol. 301] Q. How many children have they?

A. They have two.

Q. How old are they?

Mr. Davis: Well, that is objectionable, Your Hono is absolutely immaterial.

Mr. Hay: Well, I do not think it is, Your Honor.

The Court: Overruled.

To which ruling of the Court, the defendant, by its of sel, then and there, at the time, duly excepted.

Q. How old are they? A. Eight and ten.

Q. Mr. Davis asked you if you were a normal pe You have the normal attitude of a grandmother to go children, have you? A. Yes, sir.

Mr. Davis: Well, we object to that, Your Honor.

The Court: You opened that up, I think, Judge.

Mr. Davis: I may have done so, but nevertheless-

The Court: Overruled.

To which ruling of the Court, the defendant, by its esel, then and there, at the time, duly excepted.

Q. And you have the normal-

Mr. Sheppard: May we add the further declarathat it is very leading?

[fol. 302] The Court: Sustained.

Mr. Hay: I will change the form.

Q. Would you say that you have or have not a no person's concern for the welfare of your daughter and children? A. Yes, sir.

Q. You say you and Mr. Stewart for some four or and one-half years were not living together?

A. Yes, sir.

Q. How long had you lived together continuously mediately prior to his death? A. Twenty-four year

Q. I mean, since your reconciliation, after this seltion for four and one-half years.

A. Two years and a half.

Q. Two years and a half. Had you become complereconciled to each other?

A. Why, sure. He had really been at home more and more attentive than he ever had.

You had borne children by him, had you?

A.

Did you ever have any other husband?

No, sir. He nor I were never married before.

And were you and he living happily together for two and one-half years before his death? [fol. 303] A. In St. Louis and East St. Louis.

He spoke of Mr. Hamm. Is Mr. Hamm still working for the Terminal Railroad Association? A. Yes, sir.

And he has a brother working there, too?

Yes, sir. A.

He is still anxious to hold his job, is he?

·A. Yes, sir.

Mr. Davis: Well, we object to that, Your Honor.

The Court: Sustained.

Q. Mrs. Stewart, I believe you testified when you were on the stand the other day that you arrived at the hospital about 6:30 or 7:00 o'clock, or just when was it?

A. It was 6:30 or 7:00, something like that,

Q. 6:30 or 7:00 o'clock? A. Yes, sir.

Q. He had been injured, the record I believe shows here, about 5:40 or twenty minutes of 6:00? At Yes, sir.

Q. And you got over to the hospital, and how long did you stay there? A. Why, I judge about 10:00 o'clock.

Until 10:00 o'clock.

A. They insisted on my leaving so he could get rest. [fol. 304] Q. Was he conscious during all that time?

A. Yes, sir. He told me all about how it happened, and when they brought him to the hospital.

I see.. Were you there during the next day?

A. Yes, sir.

And how much of the time were you there the next

day, that would be the 13th?

A. Well, we came right about noon, or along in the afternoon, because they told us they did not want us to come in the morning, they might operate on him, and they wanted him to be rested.

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Q. And were you there after he was operated on, the next afternoon? A. Yes, sir.

Q. How long were you there?

A. Well, as I say, I got there along in the early part of the afternoon, and I stayed until, well, I judge it was about 2:30 o'clock the following morning.

Q. You were there constantly all that time?

A. Yes, sir.

Q. Were you in the room during that time?

A. Not all the time, because they insisted I go out so they could put his dressing on his arm, it had been bleeding so.

Q. I believe the record shows that in that short space of time, five different times the bandages were changed on [fol. 305] account of the bleeding. A. Yes, sir.

Mr. Davis: Now, wait a second. Do you know that, Mrs. Stewart?

A. Yes, sir.

Mr. Davis: Did you see it?

A. Yes, sir.

Mr. Davis: All right.

Q. You were there, or were you there the day that he died? A. Yes, sir.

Q. What time did you get there before on that day?

A. We was there most of the day.

Q. When was the doctor there?

A. I don't think I seen the doctor right until the latter

part, just before he passed.

Q. I see. Now, during all the time that you were there, I think you testified about his suffering pain, I won't ask you that. Did your husband talk to you during the time that you were there from time to time?

A. At intervals he did, when the pain was not so severe,

he tried to talk, yes, sir.

Q. At any time that you were there did you hear him say anything about seeing snakes, or bugs, or rats, or any thing of that sort?

[fol. 306] A. No sir. He only complained of his suffering, and how that I would get along if he was not able to

work, and he said he could not dress himself or feed himself or tie his shoes.

Q. There was entered on this record that your hushand died of delirium tremens.

A. Well, that is not the fact.

Mr. Davis: We object to that, Your Honor.

The Court: Sustained.

Q. When was the first that you heard anybody say anything about delirium tremens?

Mr. Sheppard: We object to that, Your Honor. It does not make any difference when she first heard of it.

Mr. Hay: All right.

The Court: Sustained.

Mr. Hay: All right. That is all.

Recross Examination.

By Mr. Davis:

Q. Mr. Wiechert, Mr. Haun, or Mr. Felsen did not threaten you in any way, did they?

A. In what way threaten me?

Q. Well, they did not threaten to hit you? A. Well, they better not.

Q. No. I think they had not. And they did not threaten [fol. 307] to keep you there? A. No. sir.

Q. And you could have got up and left at any time you

wanted to? A. No, I don't think I could.

Q. You mean that you could not have got out of their office at any time you wanted to?

A. Oh, I guess I could have got out.

Q. And then they told you that they wanted to go over to Belleville, didn't they?

A. Yes, sir.

Q. Take you over there. And you went out and got in

Mr. Wiechert's machine, didn't you, to Belleville?

A. Well, I have been talked to by so many people whom they had sent to talk to me, that I was so confused that I did not know really what I should do, and I thought that was the only thing to do.

Q. And you were confused by what Mr. Barrett's

mother told you and by what other people told you?

Yes, for fear her son would lose his job.

Q. You were confused about those things?

A. The pass was never brought up until now, that I know anything about.

Q. But you got in the machine and went over to Belleville in Mr. Wiechert's machine, didn't you?

[fol. 308] A. I did, yes, sir.

Q. And you found the Probate Clerk's office, didn't you!

A. Found it closed.

Yes. The Judge was not there?

I don't remember about that. I was so confused.

You were so confused. But you did not have to get in that machine and go, did you?

Mr. Hay: Oh, it is just [arguring] with the witness, Your Honor.

The Court: Well, it is cross-examination.

Mr. Davis: Yes.

Q. You did not have to get in that machine and go, did you?

A. No, I was never forced no place in my life.

Q. You were never forced any place, and Mr. Hamm and Mrs. Hamm went with you over there? A. Yes, sir.

Q. And they went out and got in the machine with you!

A. To their own interest, yes, sir.

Q. And then you got over there and you went to lunch at Elk's Club, did you not?

A. Well, the rest were going and I went, I did not want

to be contrary.

Q. You did eat some lunch, did you? A. I ate some, but I ain't saying that I enjoyed it. [fol. 309] Q. Then you left, after you left the Elk's Club or wherever it was you got lunch, you went over to the Probate Court?

A. Yes, sir.

And you talked to the Judge, did you?

I answered his questions.

Q. You answered his questions. Well, you talked to him, didn't you?

A. I had no real conversation with him. I just

answered his questions.

Q. And then after you answered his questions you signed a petition to authorize you to settle this case, did you not?

A. Yes, sir.

Q. And is that your signature to that petition (showing a paper to the witness)?

Mr. Hay: Oh, I object, to that. That has been gone over and identified.

A. I have told you that several times.

The Court: Very well, but it is cross-examination.

Q. Now, Mrs. Stewart, you said there was one thing that you did not see? A. Yes, sir.

Q. And what was that?

A. One paper, I don't remember them reading to me, but I don't remember reading—

Q. But you did read the papers, didn't you? [fol. 310] A. Yes, sir, I could not say if I read that paper.

Q. You signed this paper?

A. I may, but I was so confused, being harrassed and—

Q. You signed it?

A. That is my signature, yes, sir.

Q. That is your signature. And that is the paper that you said that there was something in it you did not see, the very one you signed, isn't it?

A. Yes, sir.

Q. And besides signing this paper you swore to it before the Clerk of the Probate Court, didn't you?

A. Yes, sir.

- Q. And you did not protest to them about signing it at that time, did you?
 - A. No, sir. I just told them that I was not satisfied.

Q. Told who? A. At the court.

Q. Told who at the court?

A. The parties that were there.

Q. Well, who were they, do you mean you told the Probate Judge? A. Yes, sir.

Q. You told the Probate Judge you were not satisfied with it. Did you tell the Probate Clerk?

A. Why, I don't remember whether there was a clerk or not, but I—

Q. Yet, in view of the fact that you were not satisfied [fol. 311] with it, you went on and signed it?

A. Yes, sir.

- Q. And after that you took the check? A. Yes, sir.
- Q. And you went down and signed a release after that?

A. Yes, sir.

Q. And then you went and took the check to the bank and put the check in the bank, didn't you?

A. After I rescinded it, yes, sir.

Q. After what?

A. After I took the money to you.

Q. Now, after you first got that check you took it over and deposited it in the bank, didn't you?

A. Yes, sir.

- Q. And who was with you when you deposited it in the bank? A. Mr. Felsen.
- Q. Was Mr. Wiechert or Mr. Haun with you when you deposited it in the bank?

A. My son-in-law and his wife.

Q. They were with you? A. Yes, sir.

Q. But Mr. Haun and Mr. Wiechert were not with you

when you put it in the bank?

A. I do not think Mr. Haun was there, and I do not remember now if Mr. Wiechert was there or not. He might have been. I could not say.

Q. But you do not think Mr. Haun was there! [fol. 312] A. But I know Mr. Felsen was there.

Q. That is when Mr. Felsen got \$150, wasn't it?

A. Yes, sir.

Q. And he went over there? A. Yes, sir.

Q. And your son-in-law and your daughter, Mrs. Hamm, went to the bank with you and saw you deposit it?

A. Yes, sir.

Q. And Mr. Felsen? A. Yes, sir.

Mr. Davis: I think that is all.

Redirect Examination.

By Mr. Hay:

Q. This Mr. Felsen, that is the man who purported to be representing you, isn't it? A. Yes, sir.

Mr. Davis: Well, we object to that question, Your Honor. That is a leading question.

Mr. Hay: I think it is entirely warranted by the facts in this case, Your Honor.

Mr. Davis: I think it is leading.

The Court: I will sustain the objection to the form of the question.

Q. Did you hire this man Felsen? A. No, sir. Q. Did you tell anybody you wanted Felsen? [fol. 313] A. No, sir.

Q. How did he happen to get into this case?

A. Well, they named several, they wanted to know what attorney I would like to have, they would have to have some attorney to finish up the business, the transactions, and they named several, and they asked me which one I wanted, and I told them they were all the same to me, I did not know any of them.

Q. And who brought Felsen in?

A. Mr. Wiechert, I presume.

Q. I see; and in the conversations that you had when Felsen was present, you were all right there in the offices of the Southern Railroad Company?

A. Yes, sir.

Q. Did you pay Felsen any part of what came to you in this matter?

A. No, sir.

Q. He was paid by the Southern Railroad Company?

A. The check was made to him.

Q. Did you at any time ever indicate that you wanted Felsen to come in and advise you what you should do?

A. No, sir.

Mr. Hay: That is all.

Recross Examination.

By Mr. Davis:

Q. That check was made out to both you and Mr. Fel-[fol. 314] sen, wasn't it?

A. One check was to Mr. Felsen.

Q. Oh, was it?

A. He did not want to take it home because he said they should keep it down there for him that night.

Q. Isn't that for \$5,150, and Mr. Felsen's name is on

A. Well, his name is on there, of course. If it had not been for me his name should not have been on there.

Q. That check is for \$5,150, isn't it?

A. Yes, sir.

Q. And Mr. Felsen got \$150, and you got five thousand dollars?

A. Yes, sir.

Q. So they did not give Mr. Felsen any check except this check?

A. Well, his name is on it. It is the same as if he had had two checks, I presume.

Q. The same as if he had two checks.

Mr. Davis: I think that is all.

Mr. Hay: That is all.

(Witness excused.)

DOCTOR JOHN H. SIMON, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, in rebuttal, as follows:

Direct Examination.

By Mr. Hay:

Q. Doctor, state your name to the jury, please.

[fol. 315] A. My name is John H. Simon.

Q. You live here in the City of St. Louis?

A. Yes, sir.

Q. How long have you lived here. Doctor?

A. I have lived here all my life, about seventy years.

Q. What is your business or profession?

A. I am a physician.

Q. In the course of your practice, Doctor, or studies,

have you made a specialty of any field?

A. I have made a specialty of mental and nervous diseases, given it more attention than any other branch, although I have not practiced it exclusively. I lectured the students for about ten years at the Missouri Medical College, in the Clinics, and gave it further special study when I was Health Commissioner at the institutions of St. Louis, particularly the insane asylum.

Q. How long did you have that connection, Doctor?

A. About two or three years in the institutions. Q. And in the course of your practice and study, have

you had occasion to observe and to treat persons with various forms of mental and nervous diseases?

A. Yes, sir.

Q. Have you had opportunity in the course of your practice to treat and study the persons with what are called [fol. 316] delirium tremens?

A. Yes, sir. I have seen a great many delirium tre-

mens cases.

- Q. And could you approximate how many you have seen ?
- A. No, I would not like to do that. I done that once or twice and regretted it, but I have seen a great many, and I have been practicing forty-nine years now, ten years of that time was devoted almost exclusively to nervous diseases, and during the rest of the time, and in general practice I saw a great many of those cases.

I think the general practitioner in fact sees more delirium tremens cases than the specialist, because the family doctor is always called in on those cases.

Q. Doctor, what are the characteristics of delirium tremens.

A. The characteristics, the outstanding characteristics of delirium tremens are, as the word itself implies, delirium and trembling, delirium tremens, means trembling delirium.

One of the outstanding, the most outstanding feature perhaps of all is the constant trembling tremors when the patient is so afflicted.

The other one is a terrible fear which is in common parlance the other name, delirium tremens, which is the hor-[fol. 317] rors.

The next outstanding feature is horror, any terrible, terrible horror or fear.

Then the other outstanding characteristic and one which-I consider absolutely essential to the diagnosis of delirium tremens, is the presence of certain visual hallucinations. The big word means that you see things which are not there, and particularly creeping crawling things, snakes,

mice, lizards and animals which do not exist at all in the world, which only exist in the imagination of the patient, and which have given the other name to this disease, which is the snakes, also called the whisky fits. There are a number of names attached to this disease, all of which include the symptoms of horror, fear, trembling and hallucinations.

Q. Now, Doctor, at my request, did you examine in detail the hospital record of the deceased in this case?

A. Yes, sir.

Q. Mr. John R. Stewart?

A. I looked the record over. I do not know whether I am going to be able to see it here. My eyes have gone back on me terribly in the last couple of weeks in spite of new glasses and everything.

Q. Will that light help you any? A. Yes.

[fol. 318] Q. I want to call your attention to certain entries in this record which has been marked Plaintiff's Exhibit "E", and first, particularly to the record of the entrance examination of the deceased. It is under date of February 12, 1937, lacerated right forearm, patient is a railroad man. Accident by having his arm caught between—

Mr. Sheppard: Your Honor, we object to that. That is the history given, and it is hearsay and incompetent in this case.

(The said document was marked for identification by the reporter as Plaintiff's Exhibit "E".)

Mr. Davis: It is self-serving.

Mr. Sheppard: It is purely self-serving.

Mr. Hay: I do not suppose there is anybody here questions he had his arm caught.

Mr. Sheppard: Well, the history given is certainly not admissible, because that is one hundred per cent violation of the hearsay rule.

The Court: Sustained.

(The said document heretofore identified as Plaintiff's Exhibit "E" consists of ten sheets, four of which contain writing on both front and back, and photostatic copies of which, comprising thirteen sheets, are here inserted.)



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[fol. 332] Q. Physique, reveals a well nourished and developed white male about sixty-one years of age, who has his right forearm amputated in upper one-third. Temperature ninety-eight. Pulse sixty. Respiration 60 bps count, bps I suppose that is blood pressure 140 over 75. [fol. 333] Head scalp grossly normal.

What does the term grossly normal, what does that signify?

A. Grossly normal means that it is normal on the gross or superficial examination without going into microscopic or detailed examination.

Q. Eyes, pupils are round and clear, react to light and

accom. I suppose that is accommodation.

A. Accommodation.

Q. No sclerol.

A. Sclerol, that refers to the white of the eye.

Q. Sclerol are conjunctival hemorrhages.

A. It means his eyes were not red, his eyes were normal, the white of his eyes looked normal like yours or mine.

Maybe I can just—

Q. Ent grossly normal. What floes that mean?

Q. What does this "ent" mean, grossly normal! I do not know that it signifies anything.

A. I do not know. It is all scratched up. You do not

even know that that is an "e".

Q. Neck. No rigidity, no tenderness, no adenopathy.

A. Adenopathy, no glands involved.

Q. Chest. Symmetrical, lungs, fremitus, nominal fremitus.

A. Fremitus, yes, normal.

[fol. 334] Q. Fremitus normal and resonance good. Breath, or breathing, I suppose, breathing sounds, clear.

A. Yes.

Q. Heart rate sixty. Rhythmic regular, no thrills. Breast tone clear, no murmur. Abdomen, liver, spleen, hidney, are not palpable. No rigidity, no tenderness, distention, no mass, no hematoma.

A. Hematoma means blood tumor.

Mr. Davis: That really means a bump, doesn't it, Doctor?

blood, if you have a bump without blood in it that is not a hematoma. A hematoma is a bump raised, filled with blood.

Q. Extremities. Right forearm amputated at upper one-third. Otherwise, extremities grossly normal. Amputation, traumatic of right forearm in upper one-third.

A. Yes.

Q. Now, that was the entry made at the time of the en-

trance examination? A. Yes, sir.

Q. What would you say, Doctor, if you have—first, I will ask you, can you from this record, form an opinion as to the base of the general condition of the patient apart from his having the arm crushed off?

[fol. 335] A. I read that before, of course, and studied it, and I do not find one single thing in there which shows anything abnormal about the patient.

My ideas from that, based entirely on that because I did not know this individual, would be that that individual was a perfectly healthy person in all respects, from that record.

Q. Now, Doctor, what is the significance of the fact that his eyes were round and clear without any discoloration in the whites of the eyes, particularly as that might have reference to the habits of the man, the drinking habit par-

ticularly I refer to?

A. Well, when it says there the scleror were white and normal, that would mean in common English that you are looking into an individual's eye, man or woman, and find it perfectly normal, that the white of the eye is clear, meaning it is not smoggy, and looking yellow, it is not injected with blood, it is not bloodshot, in other words, and not such an eye as you would expect to find in a man who had been drinking.

I think every doctor knows, and every layman nearly, that a man who has been on a drunk will show it in his eyes for several days after.

This means the eye was perfectly clear, nothing to be [fol. 336] seen there abnormal.

Q. Now, Doctor, did you go through the details of the history of this patient as recorded by the nurses?

Q. Beginning at 6:45 on the 12th, and extending to the time of his death on the 14th?

A. Well, let me see.

Q. Now, I will ask you if there are any things in particular that attracted your attention about that history as having a significant bearing perhaps upon the final outcome?

A. Yes, sir. There were several things striking in this history. One of them was, this man was suffering terrible pain. The nurses' record there, here and there, now and then, again and again and again, there is notation that he is complaining of terrible pain, that is one thing that stands out. Another thing that stands out is the fact that he received a great many injections of narcotics.

Now, I would like to make it very distinctly understood that I am not criticizing in any way the physicians who treated this case. I was not there in person, and I do not know but what all these hypodermics were necessary to relieve pain. They probably were. I am simply stating now the facts as they appeal to me, a medical man, on this paper, [fol. 337] whether they were right or wrong I make no conjectures.

I think the doctors did the very best they could, and I think, so far as I can see, the treatment was in the main what any other doctor would do under the circumstances, but nevertheless this is one of the facts that stands out here, that again and again this man was given narcotics and hypnotics.

Now, narcotic covers that class of drugs which are opiates, all derivatives of opium, like morphine, codeine, and heroin and all those things.

The hypnotics are only sleep producers but not narcotics.

He received here several times by rectum paraldehyde. Paraldehyde is a drug which is given to quiet the nervous system, given in quite large doses, four ounces I believe, into the rectum. I did not count how many times, but at frequent intervals he received a quarter grain, one-fourth grain of morphine injection hypodermically.

He also received on one or two occasions here that I can't see now, some barbiturates, salts of barbituric acid, which are again another one of the hypnotics; not narcotics.

Then there is outstanding in this case the fact that the man was given small doses of whiskey. I did not see—I do not believe, I am quite sure that I did not see anywhere [fol. 338] here where he took any nourishment during the time that he was in the hospital. It is possible he took a little milk once or twice.

Q. Coffee, I think once.

A. Coffee I did not call nourishment. Coffee is a stimulant, and I just do not remember, but I know that if he got any he got almost no nourishment in the time he was in the hospital.

Again, I want to say, I do not criticize the doctors or nurses, because possibly they could not get him to take any, but I am stating simply the fact that he did not get any, so as in the conclusion here, give my reasons why I think this man had so and thus and not something else.

The Court: He got several drinks of whiskey from time to time, Doctor. Is there no nourishment in that, Doctor?

A. There is some nourishment in alcohol, but not in the quantities in which these were given.

Now, I, of course, belong to the allopathic school of medicine and not homeopathic, and I do not believe you can kill an elephant, say, with birdshot, or that sort of thing; but if I were giving a man in this condition whiskey I would give him a real drink of whiskey, or I would let it alone, because as everyone knows, small doses of whiskey simply [fol. 339] excite you and stimulate you, and larger doses put you down. Almost every lay person knows that a little whiskey stimplates your mind, gives greater flow of blood to the brain, makes you think faster, makes you talk faster, gets you all excited, whereas if you have two or three big ones you go down and go to sleep.

Now, he did give these small doses of whiskey. Maybe the gentleman who gave that has in their experience found that that was good. I, in my experience, have found that that was no good.

In addition then to the narcotics and the whiskey and the absence of food, there stands out another thing. There stands out the fact again and again, when the nurses went to take the bandages off of this man they were saturated with blood and they were saturated with bright, crimson blood.

There are two kinds of blood, roughly speaking, one is dark red blood, one is bright red blood. The bright red blood comes out of the arteries, the dark red blood comes out of the veins.

The nurses here over and over again repeat that these bandages were soaked with bright red blood.

Now, you will have to understand how a bandage is put on. The bandage, the ordinary dressing which I suppose [fol. 340] was followed in this case is cotton is first a wad of gauze, quite thick, then some cotton, and then whatever else they want to put on, and then bandage, so that by the time the blood gets out where the nurses can see there is an awful lot of blood has come out of that man. All that cotton has to be saturated, that gauze, before it shows on the outside.

So I think this man lost a lot of blood, that is what I want to get out.

Now, those are the things that are outstanding.

There may be others that will come to me if I look at it.

Then, there is the utter absence of any, in this whole record, the word "delirium" never appears.

There is once or twice here a notation that the patient was incoherent, and another place the word "irrational" is used.

The patient was irrational.

Another thing that stands out here is that after the patient was in there some hours the temperature rose, the temperature rose to a great height. By temperature rising, I mean fever, high fever, and there is a chart here somewhere,—will you find it?

Q. I will find it.

[fol. 341] A. And one line is for pulse, do you remember?

Q. Now, there is a red line and a black line, which is which, Doctor, one is for temperature?

A. One means temperature and one means pulse.

The black is for temperature, and the red is for pulse.

I think we might dismiss the whole pulse question by saying that the pulse was even when he came in, I think it said 62, and it got constantly worse as he remained in there until it finally went up to great height, and finally stopped.

Now, where is that black line. Here it is. This black line runs up to—

Q. Here it is here.

A. Oh, here, see. It runs-

Q. The highest it reached was what?

A. One hundred and five

Q. One hundred and four and one-half?

A. One hundred and four and one-half, and you see it kept rising, this temperature kept rising from down about normal, 98, kept going up, up, up all the time until it reached 104, and down here, here it is where he died, died with that high fever.

Q. I call your attention, Doctor, to the fact that there [fol. 342] was a constant and apparently rapid rise of the

temperature.

Mr. Davis: When was that, Mr. Hay?

Q. On the 14th? A. Yes.

Q. The day of his death, beginning at 8:00 o'clock in the morning? A. Yes, sir.

Q. And running up to one hundred and four?

A. And a half.

Q. And a half at 2:30 in the afternoon? A. Yes.

Q. No, 12:30, that is 12:30. Then, at 1:30 it dropped down to 103, then at 4:30 it goes up to approximately 104, and the last entry made here has it standing at 104?

A. Yes.

Q. Which was 5:00 o'clock in the afternoon?

A. Yes.

- Q. Now, I call your attention, Doctor, to the fact, coming in there—temperature history, that when the patient came in, there is a showing of normal, and that there is a gradual rise until—
 - A. I think over here.
 - Q. Over, on the night-

A. That would be 12:00 o'clock, 12:20.

Q. That would be on the night of the, that would be 12:20 A. M. on the 13th, it was about 99. Then it runs up here, so that at 3:00 o'clock in the morning it was 101; then [fol. 343] it dropped down again until it reaches about 99 at 8:00 o'clock on the morning of the 14th, when the sudden and rapid rise—

A. Which was fatal.

Q. Ensued that ended in his death. Now, Doctor, you speak about there being, and I call your attention to the fact that—well, to go back and get this history, this patient—you won't need your specs for this, Doctor.

A. All right.

Q. This patient came into the hospital, so the record shows here at 6:45 in the evening. He had had an injury which I think the evidence shows, and which there is no dispute about here, as I understand it, which consisted of the traumatic amputation, or as we laymen would say, the mashing off of his right arm, just about the upper third, between the elbow and the wrist; that when he came into the hospital the hand was hanging, and that part of the arm to which the hand was attached was hanging by two slender tendons, and they were clipped off with scissors; that he received first aid, and a dressing was applied, and that on the 13th, about 3:30 in the afternoon the arm was amputated at the elbow, you would call that a—

A. Disarticulation.

[fol. 344] Q. Disarticulation? A. Yes.

Q. At the elbow.

Now, I call your attention to the fact, Doctor, that this record shows that at 9:30, after he came in at 6:45 on the evening of February 12th, that Doctor, there is this entry, Doctor Brennan changed dressing, large amount of bright red blood, dry dressings applied. Patient very restless complaining of severe pain and worrying about his condition.

Now, that was at 9:30, some five hours after he was injured. There was that—now, this bright red blood, that is the blood, as I understand, which comes from the arteries and not from the veins.

A. That is right.

Q. Now, I notice that on the morning of the 13th there is this entry. Doctor Hoffenberg changed dressing, moderate amount of bright red blood; dry dressings applied. Condition of patient fair. Pulse rapid but good. Again there is the note of the bright red blood. That puts it the same, as coming from the arteries.

A. The arterial.

Q. Now, at 8:00 o'clock the same morning, I find this entry, bandage becoming saturated with bright red blood, tourniquet applied for short length of time. What is the

[fol. 345] purpose of a tourniquet, Doctor?

A. Wall, a twisted thing, the tourniquet. The tourniquet is any kind of appliance you would put around a limb, arm or leg, for the purpose of twisting it. I think everybody nearly knows what a tourniquet is, but in the hospitals they have one of rubber, and it is applied to the arm and then pulled tighter and tighter so as to shut off the flood from the arteries. The tourniquet is a French word meaning to turn around. You can take a handkerchief and put a stick under it, turn it.

Q. Now, I notice another entry on the morning of this last entry, say 8:00 o'clock, on the morning of the 13th, the testimony is that he was operated on and disarticulation, I believe you call it, at the elbow took place at 3:00

o'clock, or about 3:00 o'clock. A. 3:30.

Q. 3:30 of the afternoon? A. Yes, sir.

Q. Of the 13th? A. Yes.

Q. These entries of the flow of blood from the artery, this bright red blood that I have read you, have all been-before the operation. Now, in taking off the arm at the elbow, Doctor, does one encounter arteries?

A. Yes, sir, certainly.

Q. And in the taking of the arm off, what is usually and [fol. 346] regularly done with respect to those arteries?

A. They are tied off.

Q. Tied off?

A. Tied off with ligatures, in this case cat gut ligatures I think were used.

Q. Now, then I notice that on the morning of the 14th, after this operation at 3:30 in the afternoon of the 13th, there is this entry, bandage becoming saturated with bright red blood. Then I notice also at 9:45 the same morning.

there is the entry, bandage saturated with dark blood, wet. What is the effect on a patient, Doctor, of the loss of blood?

A. The effect of a great loss of bleod on a patient is to cause prostration, weak heart, weak circulation, tend-

ency to collapse, and finally if not stopped, death.

Q. As you have reviewed this record, Doctor, would you say that there was more or less than a normal loss of blood for an injury of this kind?

Mr. Davis: I do not think he can possibly tell from that record, therefore, we object to it.

The Court: Sustained.

Mr. Hay: I do not know whether he can or not.

The Court: He is not going to. I sustained the objection, so he is not going to tell.

I sustained the objection.

Mr. Hay: Well, I will accept Your Honor's ruling.

[fol. 347] Q. Doctor, I believe you state that you do not find in this record anything indicating an excessive amount of trembling, [halucinations]—

Mr. Davis: Wait a second. He did not state that.

Mr. Hay: Just a moment. All right.

Q. I will ask, you have given here what you denominate or describe as the characteristics of delirium tremens.

A. Yes.

Q. Which of those, if any, do you find any evidence of in this record?

A. There are none there. There is no evidence in that whole record of anything like delirium tremens, absolutely not.

Q. From your review of this report or this record, Doctor, are you able to form an opinion as to what was the major, the main or primary cause of this man's death?

A. This man's death, of course, I have to give this answer more or less guardedly, because I was not there, did not examine, did not hear his heart beat, and did not see his condition, judging entirely—

Mr. Davis: Wait a second, Doctor. That, we do not think he can say.

The Court: Read the question.

(The question was repeated by the reporter.)

The Court: He may answer.

[fol. 348] To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Then, I will say again, this man's death, judging from the record which I have heard read to me and which I read myself, as here presented, judging from this record which is a fairly accurate record. I would say that this man died of an exhaustion, and exhaustion was due first to the shock, the shock of having his arm crushed, and then being brought over and the time elapsed going to the hospital, during which time he already lost a lot of blood. Then, secondly, from the loss of blood, and then thirdly, from the utter lack of, from utter inanition during the days the times he was there, not taking anything to sustain the body. I must modify that in this way, the doctors did give him glucose injections, and glucose injections are given with the intention of supplying food through the veins for sustaining the patient when the patient is unable to take food.

In justice to the hospital and the physicians, that was done, but the principal causes of death here were, first, great shock, second place, loss of blood. I have been unable to see anywhere anything like delirium tremens in this case, to cause death. There was no delirium tremens, that is my opinion, based on many hundreds of cases which I [fol. 349] have seen in my life. All the cardinal [symtoms] of delirium tremens were absent. I never saw a case in my life of delirium tremens that corresponded with the individual portrayed in this story.

Mr. Hay: That is all. You may inquire.

Cross-Examination.

By Mr. Davis:

Q. A man can die, you have known of cases where men do die of delirium tremens where they have been alcoholic and where they have received an injury! A. Yes.

Q. Yes, that is-

A. Yes, sir, I have seen them, too, but I never saw them without hallucinations and fear and horrors and sweating, and tremors, and all those things which go to make up the case. A lot of brown feathers on a bird don't make him a quail. He has got to have something else?

Q. And you have to have fur on a bear? A. Yes.

Q. Now, Doctor, it does say in here he was-

The Court: It can be a bear without fur, can it?

Mr. Sheppard: It can't be a bear without having fur, though.

[fol. 350] Mr. Hay: Well, if he had no fur he would be very bare.

Q. This does say, Doctor, that he was incoherent and irrational? A. Yes, sir.

Q. Now, isn't that an indication of the fact that he is nervous?

A. Oh, yes, sure. He was not only nervous, he had a temperature of about 103 or 4, which will make anybody incoherent. All the incoherency in this case was due to fever.

Q. Now, Doctor, you did not treat this man?

A. Certainly not. If I did I gave him absent treatment, and do not know it.

Q. You know Doctor McQuillan, do you not, over in ... East St. Louis? A. Who?

Q. Doctor McQuillan?

A. I am not acquainted with the gentleman.

Q. You know St. Mary's Hospital over there?

A. Yes.

Q. That is a Catholic institution? A. Yes.

Q. And you know that is a reputable institution, do you not?

A. Yes, sir, as far as I know. I have never had anybody over there.

Q. Well, you know its reputation?

A. Yes, sure. I say that, yes, absolutely yes, first class [fol. 351] hospital, first class doctors. They know their business and they did everything in the world for this man, as the record shows. There is no criticism of the doctors whatever, only two doctors will treat a case a different way, according to their own like, and according to the

many years behind them of experience. However, if I was giving this man whiskey, for instance, now Doctor McQuillan may be right, I may be wrong. I do not say that. But I say in the many years I practiced, if I had a man like that, and was going to give him whiskey, I would give him big doses of whiskey or I would let him alone and give him none, on the theory a little dose just excites.

Q. That is a matter of judgment?

A. That is pretty good judgment.

Q. I say, that is a matter of judgment?

A. Yes, a matter of opinion.

Q. With the individual doctors?

A. That is right.

Q. There is no conflict with the doctor because his judgment is something else than other doctors?

A. That is right. Some doctors do not believe in giving whiskey at all, and some lawyers do not either.

Q. Well, there are some of us that do, possibly.

Mr. Hay: Only one lawyer that I know of that does not believe in it.

[fol. 352] The Witness: Yourself.

- Q. Now, Doctor, you said that paraldehyde—is that the correct word? A. Yes.
 - Q. Was given to quiet his nervous system? A. Yes.
- Q. And delirium tremens is an affection of the nervous system, isn't it? A. The what?
 - Q. An affection of the nervous system?
 - A. Delirium tremens?
 - Q. Yes.
- A. Yes, but that is only one of a thousand. The fact he took paraldehyde does not make him have delirium tremens at all. Paraldehyde is used in a general way for all nervous cases, especially to produce sleep, which it did not do in this case.
 - Q. It could be used for delirium tremens?
 - A. It could be and is.
- Q. Now, Doctor, morphine, you say very often at intervals they gave him one-fourth grain of morphine?
 - A. Yes.
- Q. And morphine is given to affect the nervous system, quiet the nervous system?

A. In this case it was given more for pain, which was good treatment all right, good treatment, but it produces the crazy head. It had to be done, but it produced this [fol. 353] incoherent talk, that together with the high fever.

Q. Now, the whiskey they gave him was always to relieve his nervousness, wasn't it?

A. Well, I think that was more given to stimulate his heart.

Q. Stimulate his heart?

A. Yes, I think, probably you know, little doses of whiskey won't quiet your nervous system but make you more excitable; but they probably gave that little whiskey to sustain his heart.

Q. Now, I think the testimony here is, Doctor, that he had been away several days before he, that day of this accident, and if he had been away several days—I think the testimony is that he never went to work while he was drinking. I think that is the testimony.

Mr. Hay: Well, I did not say anything.

Mr. Davis: I thought you were going to.

Mr. Hay: I just grunted.

Q. If, Doctor, he had been away for several days, and I believe you said that in several days the sclerol came back to normal?

A. I do not get that. What is that?

Q. The sclerol. A. How?

Q. That it took several days for a man's eyes to clear up? A. Yes.

[fol. 354] Q. And if he had not been drinking for several days, then that would not have been shown, his eyes at that time would not have shown that he had been drinking?

A. No. The visible effects of a man who has been on a drunk, as everyone knows, without being a physician, the visible effects pass away in three or four days, the blood-shot eyes clear up, and the sallow complexion and the sallow tongue and bad breath, and all that disappears in three or four days if he quits drinking.

This man came into the hospital in perfect condition. •

Q. Do the eyes always get blood shot when a man is drinking?

A. Now, it depends on the brand he drinks.

And it depends on the man too, doesn't it?

A. Yes, somewhat.

Q. So this man may have been drinking at this time and

not had bloodshot eyes?

A. No, no. I do not see how that follows. You are drawing a wrong conclusion. You have just asked whether they did not disappear in three or four days. I said yes.

Q. I said, when a man drinks, gets drunk, his eyes do

not always get bloodshot.

A. No, not every man's.

Q. That is what I am saying; this man may have been [fol. 355] drinking and not be a man whose eyes become bloodshot, whose eyes showed anything?

A. We are dealing entirely here with probabilities, because nine men out of ten, ten men out of ten will show in

their eyes when they are getting over a drunk.

Q. We are not dealing with probabilities. We are dealing with what happened in this case, Doctor.

A. All right.

Q. And you do not know what happened to this man in this case, or whether whiskey effected him in that way or not, do you?

A. No, no. No, I don't know. I simply know what I

see there in this record; plenty there.

Q. Now, you say the cause of his death, as you said, was the shock, and the loss of blood between the time that he was injured and he got to the hospital?

A. No, I did not.

Q. What did you say?

A. I said that added to the other, I said he must have had a lot of blood lost, because he lost some from the accident and he lost some after the disarticulation at the elbow. That is what I said.

Q. And you saw nothing of delirium tremens in this

case, as far as you are concerned?

A. No, absolutely not. I am sure of that as I am living,

[fol. 356] that this man had-

Q. And yet this other doctor may have thought that he died in this case of delirium tremens?

A. Oh, another doctor might think that, but let me say this, please, without bragging, and I am in a United States District Court, I honestly believe I have seen more delirium tremens cases than any man living in this State, without exception. In my life, I have been forty-nine years of it, and I never did see a case of delirium tremens which corresponded with a story like that.

Q. Well, you have seen cases where a man got in-

jured and then had delirium tremens?

- A. Yes, it is quite common, and that leads them into error. They expect it, they are looking for it. That is why they call it delirium tremens, for they are in the constant expectation of seeing a man who is an alcoholic injured, it happens so often that naturally any doctor, especially a young doctor who has not had a great deal of experience, will say, "Well, here comes delirium tremens now".
- Q. Well, this doctor I think said he graduated from Washington University in 1903 and taught at St. Louis [fol. 357] University for a number of years.

A. Yes.

Q. And graduating in 1903, he would not be a young

doctor, would he?

A. No, I did not say that he was the young doctor. I am speaking generally, that a young doctor might be looking for this, and so far as these doctors are concerned, please, I am not criticizing them.

Q. No. I know that.

A. No. You know I would not do that. I would not appear on this witness stand for anything in the world if I had to criticize my fellow practitioner, unless he was a bad egg, and then I would do it gladly.

Q. But, if the doctor in this case got a history of the fact that he had been drinking just before this time, then under those circumstances wouldn't you think that he was

justified in-

A. Suspecting.

Q. Saying that the cause of death-

A. In suspecting it, yes, he would be justified in suspecting something like that, and I could not blame anybody for looking for delirium tremens with this background, but it is that, there are certain unalterable [symtoms] and inevitable [symtoms] that must be present to make this dis-

[fol. 358] ease, and one of them is the fear and the other is the sweats, and the other is the tremors and the other are the visual hallucinations, and all of them are absent, all of them.

Q. Doctor, that is your opinion as a physician whom I have known of anyway in this City for years and years.

A. Yes, sir, that is my opinion.

Q. That is your opinion.

A. That is my opinion.

Q. Now, some other doctor may justifiably disagree with you?

A. Absolutely, and when doctors disagree, you bet your money and you take your choice.

Q. He may be right and yet you believe he is wrong,

isn't that true? A. Yes.

Q. And he may be right and he may believe you are wrong? A. That is right, that is right absolutely.

Mr. Davis: I think that is all, Doctor.

Redirect Examination.

By Mr. Hay:

Q. Doctor, Mr. Davis asked you if the St. Mary's Hospital was a reputable hospital. A. I am not getting that.

Q. I will come around.

A. You are walking away from me to talk.

Q. Well, I will come up here.

[fol. 359] A. Yes. Well, come up and talk.

Q. Doctor, when you speak of the absence of any record here showing delirium tremens you are referring to the history made in the hospital from day to day, as he was treated?

A. Yes, everything contained in that paper, in that

bunch of papers.

Q. And the only reference to delirium tremens in this hospital record was made at the time of his discharge, and then it was put down as the main cause of his death, delirium tremens?

A. That is the first and only time it appears.

Q. And so far as the hospital records are concerned, there is not a single reference to delirium tremens, and the only reference is by this doctor who sums that up?

A. Yes.

Mr. Davis: If it may shorten it, I think the hospital record speaks for itself in that regard.

Mr. Hay: We wish in connection with the examination of this doctor, to offer the hospital record in evidence with the right to the defendant to read any portion they see fit, and we would like to have the same right.

Mr. Davis: Now, Your Honor-

The Court: What about the doctor, are you leaving him on the stand or are you through with him?

[fol. 360] Mr. Davis: I am through with him as far as I am concerned.

Mr. Hay: That is all.

Mr. Davis: That is the hospital record offered here. It was not introduced in evidence. Mr. Hay, which I think he had the right to do, told Doctor McQuillan he was going to take that irrespective, but that is a St. Mary's Hospital record, and it has got to go back there.

Mr. Hay: Well, I would like for the proper order to be made authorizing the withdrawal he made for the purpose of returning there, but I would like, for the purpose

of this trial, it to be considered in evidence.

The Court: All right, Mr. Hay.

Mr. Davis: I do not think there is anything in it except something he may want to argue.

The Court: When you substitute a copy I may authorize the withdrawal.

Mr. Davis: Of course, a court can do lot of things but I do not think the Court can take a hospital record of that nature and impound it.

The Court: What I am suggesting-I would not do that,

Mr. Hay: Yes. I will undertake to have a copy of it made.

[fol. 361] The Court: I am asking whether or not he has offered it, if he would.

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Mr. Davis: I wonder if they could make a copy over there and return it.

The Court: It would not have to be done that way.

Mr. Davis: We will work that out, Your Honor. I do not want, of course, to embarras them by keeping it here.

The Court: But you are entitled to have a copy in the record.

Mr. Davis: Oh, yes, yes, sir.

Mr. Hay: Mrs. Hamm, will you come around, please?

MRS. MINNIE HAMM, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further on behalf of the plaintiff, in rebuttal, as follows:

Direct Examination.

By Mr. Hay:

Q. Mrs. Hamm, you have been sworn and have been identified as the wife of Mr. Henry Hamm, who has been referred to here, and the daughter of the plaintiff, Mrs. Stewart? A. Yes, sir.

Q. Now, Mrs. Hamm, did a gentleman by the name of [fol. 362] Haun come to see you at any time before a set-

tlement was made of the case?

A. Yes, sir, several times.

Q. Speak out just a little louder.

A. My mother and I, he came to see of course.

Q. When did he first come to see you?

A: Well, he come to see my mother just about a week or two after my dad was buried. That was just visiting, conversation, that was all.

Q. And when did you next see him?

A. Well, let's see. He told us we could expect him back, and I know we waited a little longer than we had expected. It must have been about a month, I believe.

Q. You remember the occasion of your mother's em-

ploying Mr. Noell to represent her in this case?

A. Yes, sir.

Q. About the 16th of April, 1937? A. Yes, sir.

Q. And of her appointment thereafter as administratrix? A. Yes, sir.

Q. In April, 1937. I believe it has been testified here that your mother went down to Coulterville to visit a niece down there? A. Yes.

[fol. 363] Q. Between the time of your father's death and the time she went down to Coulterville, did you know how many times she was seen by Mr. Haun, that you know of?

A. I believe it was twice after his first visit.

Q. Now, did anyone else come to see you representing himself as assisting Mr. Haun or the Southern Railroad

Company ?

- A. Yes, in between his second visit and the last, the day my mother went to Coulterville, a man came one night, well, I believe it was before Mr. Haun's second visit, he came one night and there was a train man representative there, and he said he would not come in, however, since he saw we had someone there, he barely came to the door. He did not even see my mother that night, just saw me; and then he left and he came back after my mother had seen Mr. Haun the second time, and he sat and talked to us that time.
 - Q. Who was that? A. Mr. Renow.

Q. Is that the gentleman that was identified here, sitting over here?

A. Yes, sir, and he had papers referring to the Southern showing us that he was connected, and knew really the inside information on the whole thing, and he had statements there that Mr. Haun had come and talked to my mother, and that she had not been feeling well, she was very nervous and worn down, and had talked to him [fol. 364] in a bathrobe, and the general conversation that had taken place. In that way he tried to show us he was connected.

Mr. Davis: Wait a second. Don't tell us what he tried.

A. Well, he did.

Mr. Davis: I ask that that be stricken, if the Court please.

The Court: Sustained.

Q. Well, what did he say to your mother?

Mr. Davis: In your presence, if I may say, in your presence.

A. Yes, sir, that was all in my presence. I can't just remember how his conversation started, but he suggested that we get an attorney, one that he knew was good, a Mr. Stillwell, from Hannibal, Missouri, and that, I don't remember if he suggested a man that he would offer, or that he thought was good, but he did suggest our getting this man to settle the case.

Q. Was that before your mother went to Coulterville?

A. Yes, sir.

Q. Did he make any representation at any time that he had been a friend of your father?

A. He said that he knew him, but I can't remember my

[fol. 365] dad ever mentioning him.

Q. Now, did you later have any talk with Mr. Renow, either in your mother's presence or in, not in your moth-

er's presence?

A. He come back when my mother was in Coulterville, I do not know—I did not know she was to come back so soon, but he told me that my mother was coming back, and he wondered if she was there yet. That was, I guess about 9:30 because my husband was not home from work yet, and he was quitting at 11:00 at that time.

Q. When was this?

A. That was the day before, I believe, or else just a little earlier in the evening to the day she did come from Coulterville.

Q. That was in November? A. No, in the spring.

Q. In the spring? A. Yes.

Q. She came back from Coulterville? A. Yes.

Q. Did he see her there when she came back from Coulterville?

A. No, I don't think he did right then. I can't re-

member him seeing her.

Q. Well, did you know of his talking to her or talking to you after that time, before the day of the settlement?

Mr. Davis. Who was that?

Q. Mr. Renow. A. Repeat that, please.
[fol. 366] Q. Did you have any further talk with Mr.
Renow after that about it, in that form?

A. No, I don't believe I did.

Q. All right. Now, Mrs. Hamm, coming down to the time immediately before the carrying out of this arrangement whereby your mother signed some papers, your mother had been, was at that time down in Castleton, Illinois? A. Up in Castleton, yes, sir.

Q. Castleton. A. Up in Castleton, yes, sir.

Q. When did she return from Castleton?

A. It was Thanksgiving Day, we received a telegram, my husband rather, and immediately I wrote and told her about it and sent the message enclosed in my letter, and she came home I guess the very next day after she got it. Of course, that was immediately, as she could.

Q. Now, your husband had before that been over to see

Mr. Howell, as I understand? A. Yes, sir.

Q. And you knew that he had been to see Mr. Howell?

A. Yes, sir.

Q. Now, when she came back were you present when the conversation was had between your husband and your mother? A. Yes, sir.

[fol. 367] Q. About what had taken place between Mr.

Howell and Mr. Hamm? A. Yes.

Q. Speak up so that the reporter can get it.

A. Yes, sir.

Q. Just tell us what was said in that conversation.

Mr. Davis: Now, Your Honor, we think that that, anything of that nature is self-serving.

It is hearsay.

The Court: What conversation is this?

Mr. Davis: This is the conversation that Mrs. Hamm, Mrs. Stewart had with Hamm.

Mr. Hay: It was after the visit to Mr. Howell.

Mr. Davis: It is self-serving, may I say, and hearsay, and then there was nothing in that conversation that he related to her with Judge Howell that could possibly affect this case in any way.

The Court: Well, of course, there is only one theory on which it is admitted. I admitted it on that theory.

The objection is overruled.

Mr. Davis: It undoubtedly could, Your Honor, if there was anything said, but there was nothing said.

The Court: I think it is justified. The objection is overruled.

[fol. 368] To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. Go ahead.

A. What was the question, please?

Mr. Hay: Read the question.

(Question read.)

Q. That is the conversation between Mr. Hamm and your mo or with respect to what had transpired between Mr. Howen and Mr. Hamm.

A. Well, he related just the conversation as near as he could recollect it, that had gone on in Mr. Howell's office.

Q. Give us as near as you can what he told your mother.

A. Well, he told, that he had been called over to the Legal Department, and that it is not ordinarily done.

Mr. Davis: Now, wait. Did he tell her it was not ordinarily done?

A. Yes, sir. It was out of the ordinary, and that he knew it had a meaning behind it, and he asked Mr. Howell just what he wanted to see him about, and he said, well, it was pertaining to his mother-in-law's case, he said he had not known there was a case.

The Court: Now, don't say "he".

Mr. Hay: Mr. Howell.

[fol. 369] The Court: You confused it. Call names.

A. Mr. Howell told him that he had not known about it until he had been informed about it, by Mr. Campbell and Mr. Haun, and Mr. Haun's card was on the desk at the time. He handed it to my husband and he said it would be very good if he settled this thing.

The Court: Who said that?

The Witness: Mr. Howell. Beg pardon.

The Court: Told your husband?

The Witness: Told my husband, yes, told him it would be good if he would do his very best to settle the case, and since he had put himself in the thing, his own interest, my husband knew there was only one thing it could mean, was business.

Mr. Davis: I move that that be stricken out.

The Court: Sustained.

Mr. Hay: You understand, under the rules of evidence we have to eliminate certain things.

Q. Tell us what Mr. Hamm said to your mother, not what you thought about what Mr. Hamm said to your mother.

A. He told my mother it could only mean business, that they did not fool around inviting fellows over from work like that to have conversations with them, and that they did not have to make a threat, their being interested [fol. 370] in it was enough, and when they suggested—

Mr. Sheppard: Just a moment. We move to strike that out, Your Honor, first because it is not responsive to the question. That is not what Mr. Howell said at all.

The Court: Let counsel make his objection.

Mr. Sheppard: First, because it is not responsive to the question for the reason that she is not telling what her husband said Mr. Howell said, she is telling what her husband told her mother; she is filling in the matter which is wholly incompetent in this case. It does not tend to prove fraud, duress or anything else, except how he felt about it, and deductions he drew from what had transpired previously. That certainly is as far from competent testimony as one could imagine.

The Court: I do not know. It seems to me if this testimony is competent at all it probably makes it all competent.

Mr. Hay: Yes.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. Go ahead.

The Court: It is now time that we recess, Mr. Hay. Announce a recess until 2:00 o'clock.

[fol. 371] At this point, 12:30 P. M., a recess was had until 2:00 o'clock P. M.

After recess, at 2:00 o'clock P. M., Monday, June 12, 1939, the following proceedings were had:

The Court: Proceed, Gentlemen.

Direct Examination, Resumed.

By Mr. Hay:

Q. Mrs. Hamm, when we adjourned at recess I had asked you to relate the conversation between your mother and Mr. Hamm following his visit to the office of Mr. Howell, and Mr. Campbell. Now, will you proceed and relate anything additional that was said during that conversation?

A. Well, since she had not been home when he had gone to Mr. Howell's office, he told her that he had gone there, and that he and Mr. Howell had talked, and I won't need to tell the conversation, shall I, that was carried on in Mr. Howell's office?

Q. I want you to tell as fully as you can.

A. Well, he repeated that to my mother. Shall I state

Q. Now, understand, Mrs. Hamm, what I want is what was said between Mr. Hamm and your mother, not anything you thought about it, or who thought, but what was said. Just go ahead and relate all that you can recall of that.

[fol. 372] A. He told her he had gone to Mr. Howell's office, and that he had asked him about my mother's case with the Southern, and he would like that my mother settle this matter; and my husband told my mother that it would be a very good thing to do because him being called in there, it seemed that his company's interest was aroused towards this thing, and it would be the best thing concerning my husband's position to have her go down and settle the thing; that this wire had been sent to my husband which connected him more than ever with it, so he thought that was the only, rather he told her that was the only thing to

do, since he was concerned in it, and she and I both thought it was too, regardless of what the terms might be, when we got there. We all went down there then.

. Q. Then you went down to the office?

A. Yes, sir.

Q. Of Mr.— A. Campbell.

Q. Campbell?

A. He was not present, but Mr. Wiechert had his position in the—

Q. Now, something was said here about your having been at the office of Mr. Campbell before that. Had you?

A. Yes. After we received this telegram, it was impossible to get her there at the date set, and after all it was Thanksgiving Day, the date mentioned on the telegram, [fol. 373] the 27th of November, I think it was.

Q. Yes.

A. And so I went down to tell Mr. Campbell that she would not be able to be there, and of course, I do not remember if I even talked to him, I think I just talked to the girl in the outside office, and she, of course, told him.

Q. Now, you went with your mother at the time she went to the office of Campbell and Wiechert? A. Yes, sir.

Q. Pursuant to this telegram! A. Yes.

Q. And who else was with you?

A. My husband and my mother.

Q. Now, will you just tell the jury what occurred at

that office, as nearly as you can recollect it?

A. When we got there Mr. Campbell was not there again, so we saw Mr. Wiechert, who seemed to have all the things prearranged, and Mr. Haun came in directly, and we went over this thing in general, I mean it was all explained, just what my mother was to do, and the papers were shown here that she probably don't remember just everything she read. I wouldn't either, and I think they were all passed around for my husband and myself to read, too. But that did not seem to interest me so much, because the settling of the deal was the main object that [fol. 374] I was there for; and then they—let's see, Mr. Haun came in, of course, he was there, then they suggested that she have this representative for the thing, which was necessary, and not knowing any attorneys outside of her own, why they suggested Mr. Felsen, and he

was directly brought in by Mr. Haun, then this thing was reread aloud by Mr. Felsen.

After that, we talked about what my husband would have, the connections he had in the thing, of course, it was nothing to him really, but he was brought into it, and we talked over that.

Q. What was said about that?

A. Well, I brought up the subject myself. I said it just did not seem fair to bring someone else into it, like my husband and myself, where it was really my mother's own, her case, and her ideas and things, what to do, what she thought best. In cases like that people generally do not give their opinion because it may be wrong, and they are to blame.

So I said I could not see where it was fair to bring my husband and his job into it. A job meant a lot to anyone of our age, especially after he had the seniority he did, and Mr. Wiechert said it could be done and had been done; and we did know of [—] case where it had been done. [fol. 375] So then we proceeded—

The Court: Is that the exact language that he used, it could be done?

A. It could be done and it had been done, yes, sir.

The Court: Is that the exact language he used?

A. Yes.

Q. Now, what brought forth that remark, what was said by you or anyone else to lead up to his saying it could

be done and it had been done?

A. Well, I said it just did not seem fair, that there was no necessity, or need for my husband being brought into it, and I could not see why they could bring someone else into it, but knowing that my husband's job would be on the scale—just like the man on the jury yesterday, he was dismissed because he could not give his own opinion, it meant something, he could not express, he could not give his own ideas what it meant because it would be threatening his job.

Q. Now, had your husband as well as you and your mother discussed the possibility of his losing his job?

A. Yes, sir. That had been the main theory.

Mr. Davis: We object.

The Witness: In the thing.

Mr. Davis: Your Honor, unless there is some evidence [fol. 376] we are responsible for it in any way. I do not think there is any evidence here we are responsible for it.

The Court: Overruled.

Mr. Davis: There is certainly nothing in Judge Howell's testimony of anything that they testified to.

Mr. Hay: There is certainly evidence here-

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Mr. Hay: All right.

Q. Just what had been said between your husband and your mother and yourself when you went, when you talked

about the possibility of his losing the job?

A. Well, after he was brought into it by going to Mr. Howell's office, it just seemed that the main interest was centered on him then, it seemed the last remark, or something, nothing else had moved the thing or put it in their direction.

Q. As I understand you, in this conversation in Mr. Wiechert's office, you brought up the question as to whether or not his job might be in jeopardy, is that right?

A. Yes, sir, I directly—

Mr. Davis: We object to that.

The witness: (Continuing)—brought it up, because that [fol. 377] is what it seemed to me.

Mr. Sheppard: We object to that. She has already testified exactly how it came up.

The Court: Sustained.

Q. Now, after this conversation in Mr. Wiechert's office, what was done then with respect to the agreemnt to take the five thousand dollars?

A. After that we were all about ready to leave—let's see.

Q. Well, I am not particular about the exact time on that. After that you went ahead and went over to Belleville, after that, did you?

A. Yes. We went to Belleville after that.

Q. And up to the time that this discussion was had with your husband in the first instance, in which he related the conversation with Mr. Howell, and up to the time of this conversation in Mr. Wiechert's office, had your mother ever to your knowledge indicated that she would accept five thousand dollars?

A. No, sir, I can't remember even knowing what the offer would be when we got there.

Q. Now, who were present in the room at the time the things transpired in Mr. Wiechert's office?

A. Mr. Felsen, Mr. Wiechert, Mr. Haun, my mother, my husband and I.

[fol. 378] Q. Mr. Felsen had been brought in, as you say, by Mr. Haun? A. Yes, sir.

Mr. Hay: That is all

Cross-Examination.

By Mr. Davis:

Q. Mrs. Hamm, now I understand you that your husband told her, that your mother on this occasion that you mentioned, that he had been over to Judge Howell's office, and that, what was it that Judge Howell said that your husband said he said?

A. He said it would be very nice, very likely and agreeable if he would talk my mother into settling this case.

Q. Your husband said that he said that?

A. Yes. I was not there.

Q. What else did your husband say to your mother at that time?

A. Well, I just can't remember exactly the conversation, of course, but he told her that he had been called there, and that things like that do not occur ordinarily, and that Mr. Howell's interest in the thing looked as if it was just a thing that he would have to do.

Q. Now, he did not say that Judge Howell said that?

A. Oh, no.

Q. No. A. That was understood.

Q. Did he say that Judge Howell told him that he had [fol. 379] understood that they were offering five thousand dollars, did he tell your mother that, and you, on that occasion? A. No, I don't remember that.

Q. And that question was as to whether or not your

mother could get this five thousand dollars net?

A. No, I don't think he even mentioned any five thousand dollars, or anything about it, except it would be advisable to have her settle.

Q. Did he say anything that Mr. Campbell said at that

A. No. He told him to go to Mr. Campbell's, as near as I remember.

Q. And he did go to Mr. Campbell before he saw you?

A. Before he had seen me.

Q. Yes. A. Yes.

Q. Did he tell your mother what Mr. Campbell said?

A. He told me, I can't remember if my mother was there right then.

Q. He told you, you do not remember whether your mother was there right at that time. Now, that is all that your husband told your mother, is that it, that Judge Howell said it would be nice for him to settle, and that your mother, he thought he knew what that meant, that is what he told her, in effect?

A. He told her it would be the thing to do.

Q. The thing to do? A. Advisable.

[fol. 380] Q. That Judge Howell said that it would be the thing to do? A. Judge Howell, yes.

Q. Said it would be the thing to do? A. Yes.

Q. He did not say that Judge Howell had threatened him in any way? A. No, he could not do that.

Q. How? A. He would not do that.

Q. Judge Howell would not do that? A. No.

Q. No, I don't think he would. And he did not say that Judge Howell told him he would lose his job, did he?

A. No, he could not do that either.

Q. You mean by that, that Judge Howell would not do it?

A. No, he would not need to. A suggestion would show slight signs of interest, and he did not ordinarily have interest in the men's lives that worked for him.

Q. And he did not tell your mother that Judge Howell threatened him with his job, or anything of that nature?

A. No. He did not tell him he threatened him,

Q. Now, when you got over to Mr. Campbell's office, you went after getting this telegram, or your husband getting it, you went over there twice, did you not?

A. I went by myself once, to arrange this meeting, and

I went with my mother and husband afterwards.

[fol. 381] Q. Who did you see when you went the first time?

A. I can't remember. It may have been a secretary, just outside the office. I just made arrangements for the day when she would get there.

Q. Then, when you went over there, what time did you

get there?

A. You mean the time we all went?

Q. Yes.

- A. Oh, I judge around ten o'clock. I can't remember that.
- Q. And as you say, you sat there and you read the papers? A. I think so.

Q. You read them all?

A. I think so, as near as I can remember.

Q. And Mr. Hamm read them all?

A. He read more than I read.

Q. And your mother read them, didn't she? A. Yes.

Q. And then when Mr. Felsen came in, Mr. Felsen read them? A. He read them aloud, yes, sir.

Q. And you said that it did not seem fair to bring your husband in it, and his job in it, and then Mr. Wiechert said that it had been, it could be done and it had been done? A. Yes, sir.

Q. Was that all that was said?

A. Oh, I don't remember. There was just, I guess a [fol. 382] lot of general conversation, because they seemed interested in settling the case, and my husband and I, that was the purpose we had gone there for.

Q. You and your husband had gone there to settle the

case! A. Yes.

Q. And your mother with you? A. Yes.

Q. But I say this thing about what was said about your husband, it did not seem fair to bring, you said to Mr.

Wiechert, it did not seem fair to bring "my husband in it and his job in it", and then Mr. Wiechert said "it could be done and it had been done"? A. Yes.

Q. Now, was that all that was said about that?

A. About his job?

Q. Yes.

A. I don't remember, but that was enough, I think.

Q. You think that was enough? A. Yes, after-

Q. But that is all that you remember being said, at the present time? A. I think so.

Q. Now, you went down to the Probate Court, did you

not? A. Yes, sir.

Q. And when you got down there the papers were read over?

A. I don't remember if they were read over or not. They did look at them, and my husband and I signed as [fol. 383] witnesses, I do remember that.

Q. And you went to see the Probate Judge with your

mother, did you? A. Yes.

Q. And did she sign the papers there?

A. I just can't remember that.

Q. Did she swear to it? A. She probably did.

Q. Did she swear to it before the Probate Judge rather?

A. She probably did.

Q. Well, do you remember that?

A. No, I do not.

Q. Now, where is Mr. Hamm today?

A. He is working.
Q. He is working?

A. Sleeping now, because he works nights.

Q. He is still working for the Terminal Railroad?

A. Yes, sir.

Q. You are still living with him as his wife?

A. Yes, sir.

Q. Now, the only man that said anything about a job was Mr. Barrett, wasn't it?

A. That was told to my mother-in-law, yes.

Q. Told to your mother-in-law?

A. Concerning that pass, that pass was not mentioned, that subject.

Q. Well, Mr. Barrett said it was, didn't he?

A. Mr. Elliott mentioned it here at the other hearing, yes.

[fol. 384] Q. Mr. Barrett mentioned it at the other hear-

ing, too, didn't he?

A. I can't remember. I remember Mr. Elliott did; he probably did, yes. As I say, that was told me by someone that he had, so I do not know exactly what he had said.

Q. But that had nothing to do with anybody with the

Southern Railroad, what he said, did it? A. No

- Q. Whatever Mr. Barrett said. What was it that Mr. Barrett—did you hear him say it? A. No.
 - Q. You did not hear him say it?

A. No, I was-it was told me.

Q. Told you? A. Yes.

Q. Who told you? A. My mother-in-law.

Q. Did they tell your mother at the same time?

A. No.

Q. They did not tell your mother?

A. My mother was not there then.

Q. You do not know that Mr. Barrett ever had any conversation with anybody with the Southern Railroad?

A. No, sir. He was supposed to have talked to Mr. El-

liott from the Terminal Railroad.

Q. From the Terminal Railroad! A. Yes.

[fol. 385] Q. And what was that conversation about?

A. Well, it was told me, it is hearsay.

Q. Well, who told you?, Well, don't-

Mr. Hay: You have been going into this.

The Witness: You have been asking me about

Mr. Hay: Asking for hearsay, and making innuendos about it.

Mr. Davis: No. I am not asking for hearsay. I thought it was, what was told her and told her mother.

Q. Did this conversation with Mr. Wiechert come up, where he said that it, you said it did not seem fair to bring "my husband in it and his job in it", and he said, "it could be done and it had been done"? Was that before or after the papers were signed?

A. That was before, that was when we first got there.

Q. Before the papers were signed.

Mr. Davis: That is all.

Mr. Hay: That is all.

(Witness excused.)

H. B. HAUN, a witness of lawful age, having been here-tofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further on behalf of the plaintiff, in rebuttal, as follows:

[fol. 386] Direct Examination.

By Mr. Hay:

Q. Mr. Haun, I will ask you whether or not you requested or authorized, or requested and authorized Mr. Renow to do anything toward assisting you in making this settlement? A. Yes, sir, I did.

Q. Did you also get in touch with a man by the name of Hanley, down in Kentucky, and ask him to assist you?

A. Yes, sir,

Q. Did you also go to Mr. Joe Howell, the General Counsel of the Terminal Railroad, and ask him to call Mr. Hamm, the son-in-law of Mrs. Stewart, in?

A. Yes, sir.

Q. You know, do you not, that at that time and at the present time, Mr. W. N. Davis, the gentleman who has been actively conducting the defense in this case, is attorney for the Terminal Railroad! A. Yes, sir.

Q. And that Mr. Sheppard, who sits over here, is also

an attorney for the Terminal Railroad?

A. I have known that since this hearing started. I never knew Mr. Sheppard until

Q. You also know that the Southern Railroad has coun-

sel in this City?

A. Yes, sir, and in this room, Mr. Lucas there.

[fol. 387] Q. That the gentleman sitting back here, Mr. Lucas, is attorney for the Southern Railroad?

A. Yes, sir.

Mr. Hay: That is all.

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Cross-Examination.

By Mr. Davis:

Q. You also know, that Mr. McPheeters, who is counsel for the Southern Railroad, has died since the beginning of this trial, do you not?

A. Yes, sir. I attended his funeral.

Q. I mean at the beginning of this suit.A. Yes, sir. I attended his funeral.

Q. Now, Mr. Haun, where do you live?

A. I live in Webster Groves.

Q. And your business? A. The location?

Q. No, what is your business?

A. I am at present rated Assistant Chief Claim Agent for the Southern Railroad Company.

Q. You know something about the settlement of this case with Mrs. Stewart, do you not? A. Oh, yes.

Q. Just relate what happened.

Mr. Hay: Just a moment. We object to that as cross-examination of the witness. If the gentleman wants to go [fol. 388] into that in his own case, we have no objection.

The Court: Sustained.

Mr. Hay: I think just the orderly procedure, Your Honor, is the only thing I have in mind.

Mr. Davis: Well, I will say frankly it is new procedure to me, Your Honor. It may be the procedure in this court.

The Court: What did you ask him on cross-examination about, Judge?

Mr. Davis: I asked him to relate the happenings.

The Court: That is not cross-examination.

Mr. Davis: He has related part of it.

The Court: That is not cross-examination, Judge. This man has been put on here by the plaintiff as his witness.

Mr. Davis: Yes.

The Court: And that is certainly not cross-examination.

Mr. Davis: Well, possibly I am mistaken.

Mr. Sheppard: What is it, Your Honor? It is not direct examination?

The Court: You are not interrogating me, are you?

Mr. Sheppard: No, but I just wondered. I could not understand it, that is all.

[fol. 389] Mr. Hay: May I undertake to explain, I put the gentleman on as our witness, to ask him certain specific questions.

The Court: You may cross-examine him on those questions asked of him.

Mr. Hay: Yes. This does not relate to anything I asked him.

The Court: That is all.

Mr. Hay: That is the point I make.

Mr. Davis: Frankly, I knew that applied in a criminal case. I did not know it applied in a civil case, but I am probably mistaken.

Mr. Hay: That is under the new rules,

It has been the rule here in the Federal Court, well, I have known about it for forty years.

Mr. Davis: Sixty, Mr. Hay, or seventy.

Mr. Hay: Sixty.

Mr. Davis: That is all at the present time, Your Honor.

The Court: Very well.

Mr. Davis: That is all.

Mr. Hay: That is all we have at this time, Your Honor.

And thereupon the defendant, to further sustain the is-[fol. 390] sues in its behalf, offered the following evidence in surrebuttal:

Mr. Davis: May I recall Mrs. Stewart, please?

The Court: Very well.

Mr. Davis: Mrs. Stewart, will you come around, please?

Mrs. Mary Stewart, a witness of lawful age, having been heretofore duly produced sworn and examined, upon be-

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ing recalled to the witness stand, testified further on behalf of the defendant, in sur-rebuttal, as follows:

Direct Examination.

By Mr. Davis:

- Q. Mrs. Stewart, when you got this check or draft for five thousand dollars, you deposited it in what bank in Illinois?
 - A. In the Southern Bank.

Q. The Southern Bank? A. Yes, sir.

Q. And then you drew it out of the Southern Bank?

A. Yes, sir.

Q. And then you took it over and tendered it to Mr. Wiechert?

A. Yes, sir.

Q. And he refused to accept it? A. Yes, sir. Q. And then what did you do with the money?

A. The Mercantile Trust.

[fol. 391] Q. In St. Louis, Missouri? A. Yes, sir.

Q. Have you used any of that money?

A. Yes, sir.

Q. How much have you used?

Mr. Hay: We object to that, Your Honor.

The Court: Sustained.

Mr. Davis: Your Honor, that shows ratification.

Mr. Shepard: Let us make our offer of proof.

(Thereupon, out of the hearing of the jury, the following offer of proof was made:)

Mr. Sheppard: Defendant offers to prove by the plaintiff, who is now on the witness stand, just the amount of money which she has used of this five thousand dollars, and because defendant does not know the amount defendant requests permission to make this offer of proof by questions and answers to the witness outside the hearing of the jury.

The Court: As I recall this testimony, she made a tender, and it was refused.

Mr. Sheppard: Yes, sir. No question about it.

Mr. Hay: We object to it.

The Court: Sustained.

Mr. Sheppard: Will Your Honor permit us to ask these questions and answers for the purpose of showing how [fol. 392] much—we do not know. We can't put that in our offer. I mean out of the presence of the jury, just a proof, offer of proof.

The Court: Very well. I do not see the occasion of examining the witness out of the presence of the jury. I thought there were some questions you wanted to ask for the purpose of making your record.

Mr. Shepard: It is to show how much she spent.

Mr. Hay: Our point is that [—] is wholly immaterial, not in issue in this case.

Mr. Sheppard: I know it is, but our point is it is mighty material. We have a right to show how much she used and at what times.

The Court: If I sustain an objection I am not going to let you go ahead and develop the same facts after I have made a ruling.

Mr. Sheppard: I mean out of the hearing of the jury.

The Court: I don't care if it is out of the hearing of the jury or out of the hearing of the court. I do not think you are entitled to that. I do not think it is—there is testimony here that she made a tender and that you declined it, and I do not see that you have any right to show what she has done with the money after that.

Mr. Sheppard: I understand that perfectly, but we dis-[fol. 393] agree with you. I want to make our offer of proof, that is all, and we cannot state to you how much she spent, because we do not know.

Now, we want to ask her out of the presence of the jury and for the purpose of our proof, how much she spent, and how much she has left as part of the offer of proof, that is all.

Mr. Hay: I do not see how that could possibly affect their case. If they are entitled to show this, they are entitled whether they know the amount or do not know the amount. Mr. Sheppard: The Court has already ruled whether we are entitled to show it. All we are asking is to get our proof in the record.

The Court: Are you objecting Mr. Hay?

Mr. Hay: I am.

The Court: Sustained.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

(Witness excused.)

Mr. Davis: Judge Reis, will you come around, please? [fol. 394] PAUL H. REIS, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, in sur-rebuttal, as follows:

Direct Examination.

By Mr. Daviss

Q. Judge Reis, won't you please state your name?

A. Paul H. Reis.

Q. What is your business?

A. I am the Judge of the Probate Court, St. Clair County, Illinois.

Q. And where do you live? A. Belleville.

Q. Belleville, Illinoist A. Yes, sir.

Q. Do you remember Mrs. Mary Stewart?

A. Well not—I have no independent recollection of Mrs. Stewart. I recall this particular administration over there.

Q. Well, do you remember when she came over there and presented a petition for a settlement?

A. I recall that she was there, yes.

Q. And do you remember whether or not she said to you that that settlement was not satisfactory, to you?

A. She did not say that to me.

Q. If she had said that to you, what would you have done?

A. Well, I would never have ordered her to sign an order for it, to compromise that claim. It is customary to

[fol. 395] Mr. Hay: We object to that. It is purely argument.

The Court: Sustained.

To which ruling of the Court, the defendant, by its cel then and there, at the time, duly excepted.

Q. But you recollect that she did not say to you that that, the settlement was not satisfactory?

A. Definitely I recall that.

Q. Did you ask, her if she was satisfied with it or not?

A. It is customary to do that. I am quite sure I did.

Q. You have no independent recollection of asking her that, however?

A. No, I have no independent recollection, but it is the practice in compromising these claims to inquire whether or not they are satisfied with the settlement that is offered.

Mr. Davis: I think that is all.

Cross-Examination.

By Mr. Hay:

Q. Judge, as I understand, you have no independent recollection of that?

A. No, none.

Q. You have a lot of cases?

A. That is just the same as any other compromise.

Q. And do you recall, Judge, that at the time a gentleman had signed his name as her attorney, a Mr. Felsen, do you remember that?

A. I recall that Mr. Felsen was there.

[fol. 396] Q. Well. A. Signed.

Q. Assuming she was represented by an attorney, it would be natural for you to confer with the attorneys and understand that everything was agreed on?

A. That is right.

Q. And whether or not you had any talk with Mrs. Stewart herself, individually, you have no recollection at this time, have you?

A. No more than any other case, that is the usual pro-

cedure.

Q. That is the usual procedure?

A. Yes.

Mr. Hay: That is all.

Redirect Examination.

By Mr. Davis:

Q. But you are sure that she did not say to you that the settlement was not satisfactory?

A. That I am positive of, yes.

Recross Examination.

By Mr. Hay:

Q. Well, Judge, you are just proceeding on the theory that if she had said that you would not have gone on with

it, how?

A. Well, it is customary to ask, and I am sure I would not have signed an order authorizing her to compromise [fol. 397] that claim if she had indicated that she was not satisfied with it.

Q. But where an attorney comes in representing her, you of course assume that everying is all right?

A. Well, the verified petition presented to me-

Q. Certainly, and you went ahead on that?

A. That is right.

Q. Understand, we are not suing you, Judge, for doing

anything wrong. A. That is right.

Q. I just say, you just treated it as any other case; the sum and substance of it is you haven't any independent recollection of talking to her at all, have you?

1. No, not independent recollection.

Mr. Hay: That is all.

Redirect Examination.

By Mr. Davis:

Q. Oh, was there then an Illinois attorney there representing her? A. Yes, sir.

Mr. Davis: That is all.

Mr. Hay: Now, I want to ask him—I had a question, but it is too mean. I won't ask it.

Mr. Davis: Go ahead.

Mr. Hay: That is all.

(Witness excused.)

[fol. 398] Leonard O. Reinhardt, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further, on behalf of the defendant, in sur-rebuttal, as follows:

Direct Examination.

By Mr. Davis:

Q. Mr. Reinhardt, what is your name, sir?

A. Leonard O. Reinhardt.

Q. And you are Clerk of the Probate Court of [the] St. Clair County, Illinois? A. Yes, sir.

Q. And you live in- A. East St. Louis, Illinois.

Q. East St. Louis, Illinois. Do you remember when Mrs. Stewart was there, at the settlement of this claim against the Southern Railway?

A. Yes, sir.

Q. Did you talk to her at that time? A. Yes, sir.

Q. Do you recall? A. Yes, sir.

Q. Did she make any complaint to you or say anything to you about not being satisfied with this settlement?

A. They just came, Mr. Wiechert and Mrs. Stewart came up to the counter, they were just up there for a minute. She signed her name. There was no conversation [fol. 399] took place at the counter, where the affidavit was taken, outside of the regular procedure of swearing her in.

Mr. Davis: That is all.

Cross-Examination.

By Mr. Hay:

Q. In other words, Mr. Wiechert just brought her up there and she signed, and that was all there was to it?

A. We have a table in front of this, in the outer office, and they discuss their affairs, and prepare their papers on this table, and after the papers are prepared, they bring them up to the table to be sworn to.

Mr. Hay: That is all.

A. Yes, sir.

Mr. Hay: That is all, sir.

Mr. Davis: May they be excused, those witnesses?

The Court: Have you any objection?

Mr. Hay: No objection.

The Court: Very well, they may be excused.

(Witness excused.)

R. H. Wiecher, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further, on behalf of the defendant, in sur-rebuttal, as follows:

[fol. 400] Direct Examination.
By Mr. Davis:

Q. Mr. Wiechert, won't you please state your name?

A. R. H. Wiechert.

Q. And what is your business? A. A lawyer.

Q. You are a member of the firm of Kramer, Campbell,

Q. Were you present on the 30th day of November, 1937, November 30, 1937, when this settlement was made with Mrs. Stewart?

A. Yes, sir.

Q. And where did you first see her?

A. When she came to my office that morning about 9:30 or 10:00 o'clock.

Q. And what was done at that time? A. She-

Q. Who was with her, in other words?

A. She and Mrs. Hamm, her daughter, and Mrs. Hamm's husband came to the office.

Q. Now, just relate what took place there.

A. Well, when they came in, they seated them in the office, and we sat down to discuss this. There was no discussion as to any amount because we all assumed that they were settling for five thousand dollars, but the only discussion was with reference to taking care of any attorney fees that Mrs. Stewart might be liable to Mr. Noell for, and [fol. 401] that was our principal concern.

Q. Now, what was said about that?

A. Well, I told her or told the parties in the room that I did not think she would be liable for any attorney fees that Mr. Noell might claim, because at that time he was not permitted to practice law in the State Courts of Missouri,

and he was not admitted to practice in Illinois, but that we would take care of any attorney fees that she might be legally liable for in any claim that Mr. Noell might make against her for attorney fees, and assured her that the five thousand dollars would be free and clear to her.

Q. Now, did she want you to put that in writing?

A. She did want me to put that in writing and I told her that we would not do that, that she had to take our word that we would live up to that promise.

By the Court:

Q. What was the objection to putting it in writing, Mr. Wiechert?

A. Well, we did not want Mr. Noell to get hold of anything of that kind. That was the principal reason.

Q. Now, what else was said there?

A. Well, that was the principal discussion, and after they were in the office awhile, I called Mr. Haun in, for him to assure them of the same thing that I had assured [fol. 402] them of, and then it came after they agreed on the settlement on that basis, that they took our word for that, then we told them that this had to be approved by the Probate Court, that we insisted on that, and told them that they would have to be represented by counsel, Illinois counsel, that if they had anybody in mind they should suggest such counsel, if they did not we suggested Mr. Felsen, who has offices in the same building that we have, and finally Mrs. Stewart agreed to that.

Q. Agreed to Mr. Felsen?

A. Agreed to Mr. Felsen, and then Mr. Felsen was called into the office.

Q. Now then, what did you do?

A. Then Mr. Felsen read over the papers, read them out loud. There were several papers there, petition, release and a check and so forth, and read them all out to all the parties in the room. Then after he got through, Mrs. Stewart read them over individually. She took a little time in reading over each paper that I had prepared.

Q. And then after that what was, after that was done,

what did you do?

A. Then we went over to Belleville in my machine, and we got over there during the noon hour, from 12:00 to 1:00, and the Probate Judge was not there, and I invited them

to a lunch, that is Mr. Haun was not, that is, just Mr. Fel[fol. 403] sen and Mr. and Mrs. Hamm, Mrs. Stewart and
myself. Then, after lunch, we went into the Probate
Clerk's office and the papers were, that is the petition to
the Probate Court was handed to Mrs. Stewart, and she
again glanced over it or read it, and then she went up to
the counter of the Probate Clerk's office and subscribed to
it in the two places where she had to subscribe to that and
swear to it. Then we went into the court room and Mr.
Felsen presented it to the Judge there, and he approved
the order that had been prepared.

Q. And then after that, then what did you do?

A. Then after that we left the court room, went back to the Clerk's office, and the release was presented to Mrs. Stewart and she read that again, and she finally signed it, and the check was handed over to her for the \$5,150, payable to her and Mr. Felsen.

Q. Did she take it back to Illinois, I mean did you take

her back to East St. Louis?

A. Took her back to East St. Louis, and she asked me to let her off at the Southern Illinois National Bank, and I took her down there, and she and Mr. Felsen and Mr. Hamm went into the bank. Mrs. Hamm and I stayed out in the car. When they transacted their business and come out they got back into the machine, and I asked them where I [lol. 404] I could take them to, and they told me to take them up to Missouri Avenue near Collinsville, and let them off there, which I did.

Q. Then they came into your office afterwards and

tendered you the money?

A. Yes. About a week later they came into the office and tendered back the money.

Q. Which you refused to accept?

A. Which I refused to accept.

Q. Now, was anything said about them—was anything

said about they could accept it or not, or money?

A. Yes. In the course of the conversation Mrs. Stewart said well, she would not settle unless we put that down in writing, about the attorney fees, and Mr. Haun told her said, well, you do not have to settle, that is up to you whether you want to settle or not. If you sattle this you have got five thousand dollars. If you do not settle

it, and the case is tried, you might not get anything, and you might get more, or words to that effect.

Q. That is as near as you can recollect it? A. Yes.

Q. Now, was anything said about Mr. Hamm's job?

A. Absolutely not.

Q. Did Mrs. Hamm say to you it did not seem fair "to bring my husband in it and his job in it"?

[fol. 405] A. She did not.

Q. And did you say "it could be done and it had been

done"1

A. I did not say anything to that effect, and there was no conversation about anybody's job.

Q. Did you have any conversation either with Mr. Hamm or Mrs. Hamm, or Mrs. Stewart about his job?

A. Absolutely not.

- Q. Do you remember whether the Judge in the Probate Court asked Mrs. Stewart whether she was satisfied with the settlement or not?
- A. Yes. I do remember that we were sitting at a table in front of the Judge's desk, and he just asked her if she was satisfied with the settlement, and she said yes, and then he signed the order.

Q. Did anything else happen over there that you know

of? A. In the Probate Court?

Q. Yes, sir. A. No, sir.

Q. Why did you refuse to deal with Mr. Noell, Mr. Wiechert?

A. Well, he was suspended from the practice in the State Courts of Missouri. He was not an Illinois lawyer, never had been admitted to practice in Illinois.

Q. And that is the reason that you—

A. Oh, there were a lot of other reasons, too. We had had previous experience with Mr. Noell.

[fol. 406] Q. In what respect?
A. In chasing cases.

Q. And other things? A. Yes, sir.

Q. Now, what were some of those other things?

A. Well, I am only speaking of knowledge that I gained from others.

Q. Well, there were-well, then.

Mr. Hay: Other railroad lawyers, I presume?

The Witness: And other lawyers, too.

Mr. Hay: Yes, some of your kind.

Mr. Sheppard: Your Honor, I think that is uncalled for entirely.

Mr. Davis: Mr. Hay is talking about his own kind.

The Court: Yes. We won't have any personalities here. I won't tolerate it.

Mr. Hay: Is that all?

Mr. Davis: That is all.

Cross-Examination.

By Mr. Hay:

Q. So the lady that you were dealing with was this lady back here, whose lawyer, according to your statement, was not at that time entitled to pursue the case?

A. I did not say that.

Q. But you would not deal with her lawyer?

A. I would not deal with her lawyer.

[fol. 407] Q. And what you did was to pick a lawyer for her?

A. For the purpose of having the settlement approved in the Probate Court.

Q. Yes, for the purpose of putting over the settlement that you and the claim agents had been able to work out?

A. Oh, absolutely not, Mr. Hay, we were not putting anything over.

Q. How long have you been practicing law?

A. Since 1914.

Q. You have been over in East St. Louis, haven't you?

A. Yes, sir.

Q. Do you know that there are a lot of boys working for the railroad over there, you do, don't you?

A. Yes, that is true.

Q. You knew that you were dealing with a little woman, with whose lawyer you would not deal, whose son-in-law had been called in to the Legal, into the Law Office of the Terminal Railroad, and urged to use his influence with his mother-in-law to settle the case, didn't you?

A. Well, I did not know anything about urging or using

influence to settle.

Q. You knew that this boy, this young man working for the Terminal Railroad, and who wanted to hold his job with the Terminal Railroad, had been called into the office of [fol. 408] the attorney for the Terminal Railroad to talk about that case, didn't you?

A. I knew that he had been in to see Mr. Howell, yes,

sir.

Q. And you were willing, as a lawyer, to go on and consummate a settlement that had been brought about under those circumstances?

A. Now, what circumstances are you speaking of?

Q. I am talking about the circumstance of the lawyer head of the Terminal Railroad Company, calling a humble workman into his office to talk to him.

A. I do not think that is anything unusual.

Q. You do not? A. No.

Q. There is no use for you and me to argue about as fundamental thing as that.

Mr. Davis: Let Mr. Hay ask questions. We object to that. Let Mr. Hay ask questions.

The Court: Certainly.

Q. Don't you know, as a lawyer, as a man who knows something about human nature and the effect of a movement on the part of a superior upon one in an inferior relation, that there was just one inevitable consequence of Howell's calling this boy into that office?

Mr. Davis: Now, we object to that, Your Honor. How could he know that?

[fol. 409] Mr. Hay: I am asking his knowledge of human nature.

Mr. Sheppard: It is argumentative.

Mr. Davis: Yes, it is argumentative.

Mr. Hay: This is cross-examination.

Mr. Davis: I know it is cross-examination, still it is argumentative.

The Court: Sustained.

Q. You are attorney for the Southern Railroad?

A. Yes, sir.

Q. This gentleman is attorney for the Southern Railroad? A. Yes, sir.

Q. And the representative of your railroad, goes to the head of the Legal Department of the Terminal to get him to call Henry Hamm in and talk to him about this case, and you think that was not calculated to make an impression upon young Hamm?

Mr. Davis: Now, we object to that, Your Honor.

The Court: This is cross-examination.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. Do you!

A. Mr. Hay, under the circumstances, from the information that we knew at that time, it was Mr. Hamm alone that was blocking this settlement.

Q. Just answer my question. My question is-

[fol. 410] A. I did answer your question.

Mr. Hay: No, you haven't. I beg your pardon.

The Court: Read the question.

(Question read.)

A. Absolutely not, in this day and age when a workman for a railroad is a member of the Brotherhood, that would have no effect at all on him to be called in by a member of the Legal Department of any railroad. He knows his job is secure.

Q. Well, he knows and you know that if a railroad company is determined to get rid of a man, that many things can be found wrong with his work against which it is im-

possible to defend under the rules?

A. Oh, absolutely not, Mr. Hay.

Q. Well, I know that.

A. Well, they can appeal to the Railroad Labor Board.

Mr. Davis: We object to that.

Mr. Sheppard: We object to that.

The Court: Counsel is making an objection. You know enough to stop.

Mr. Davis: We object to that, to Mr. Hay testifying.

The Court: Sustained.

Q. Go back just a moment. So, you went on with this settlement, you knew, did you not, that Mrs. Stewart, from [fol. 411] the time Joe Howell called her, called Hamm into the office, up to the time she appeared in your office, had never had the advice of a disinterested lawyer representing her, didn't you?

A. I do not know about that.

Q. Well, she did not appear there with any lawyer at all, did she?

A. No, she did not appear in my office with any lawyer.

Q. And the only lawyer that participated was the lawyer who was brought in at your instance, and who was paid by the Southern Railroad Company, that is true, isn't it?

A. With the consent of Mrs. Stewart.

Q. Oh, certainly.

A. She agreed to it or I would have never called Mr. Felsen in.

Q. You say that the reason you would not deal with Mr. Noell was because he had been suspended from practicing in the State Court? A. Yes, sir.

Q. Did you or did you not know that he had not then been and never has been sustained from practice in the

Federal Court?

A. I think you are mistaken about that. If I remember correctly, he was suspended in the Federal Court, and on appeal that was set aside.

Q. And the Appellate Court held that the order suspending him in the State Court was void, didn't they? [fol. 412] A. I do not know anything about that.

Mr. Davis: No. They held no such thing and they could not hold it, because that is still in force, and Mr. Noell does not practice in the State Court today.

Mr. Hay: Well, we will offer that in evidence.

The Court: If counsel will quit testifying, and would like to have the Court testify the Court will tell what the facts are.

Mr. Davis: Well, we will let the Court testify.

The Court: Well, counsel should quit testifying and let the witnesses testify.

Q. Now, the sum and substance of it all is that you dealt with a client of Mr. Noell's upon the ground that you would not deal with him, and who was not represented by any other lawyer, that is true, isn't it?

A. Yes. May I add something further. Mrs. Stewart-

Q. No, I don't care

A. Also told us she wanted to get rid of Mr. Noell.

Q. That was after you and Howell and Haun had operated on her, wasn't it?

A. That was on November 30th, when she was in my

office.

Q. Yes. Are you a member of the Bar Association?

A. Yes, sir, I am a member of the American Bar Association, of the Illinois State Bar Association and the [fol. 413] East St. Louis Bar Association.

Q. And in the face of that you went on and consummated a settlement with a woman whose son-in-law had been called in to the office of the head of the Terminal Railroad, for which company he worked, and who was inevitably concerned about his job, and carried out that settlement, is that true?

Mr. Sheppard: We object to that, Your Honor, because that is not a question, that is an argument to the jury.

Mr. Hay: I am asking him if that is true.

Mr. Sheppard: Just a minute. Pardon me.

The Court: Let counsel make his objection.

Mr. Sheppard: And for the further objection, on the further ground rather, that it is wholly argumentative and is not for the purpose of eliciting any testimony in this case relative to any of the issues in it.

The Court: Sustained.

Q. Did you know that this case was set for trial on the 8th of December, just a week after you made this settlement?

A. I knew it was a short time after this settlement was made, ves.

Q. And did you also know that Mr. Noell was to try that case in this court? A. Yes, sir.

Q. And that he had the right to try it in this court? [fol. 414] A. I presume he did.

Q. Did you tell Mrs. Stewart that?

A. Oh, I presume that she knew it.

Q. You did tell her that you would not agree to pay Noell's fee, because he had been suspended in the State Court, didn't you know that if he was entitled to practice in this court that he would be entitled to his fee in the case?

A. He would not be entitled to an attorney's lien under

the State law.

Q. So you were willing to take advantage of that situation, refuse to give a written agreement for fear Noell might get hold of it and protect himself?

A. What do you mean by protect himself?

Q. You said you did not want to give a written agreement because you were afraid Mr. Noell would get hold of it, didn't you? A. Yes.

Q. In other words, you were afraid that Mr. Noell might thereby be in a better position to protect himself?

A. We thought it—I thought it might be an admission to put something in writing, that the Southern Railroad Company was liable for attorney fees to Mr. Noell, which they were not.

Q. That if you did not do that you might be able to beat [fol. 415] him out of his fee, that is what you thought,

wasn't it?

A. If, he would have to establish his fee in a court of law, yes, and we did not think he could.

Q. And you thought you would beat him out of it,

didn't you? A. Oh, I would not say that.

Q. And that is what you wanted to do, wasn't it?

A. I would not say that.

Q. Well, I will give you plenty of time to think over what you would say.

That is all.

Mr. Davis: That is all.

(Witness excused.)

ARTHUR R. FELSEN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, in sur-rebuttal, as follows:

Direct Examination.

By Mr. Davis:

Q. Mr. Felsen, won't you please state your name?

A. Arthur R. Felsen.

Q. And where do you live?

A. 705 Alhambra Court, East St. Louis, Illinois.

Q. And what is your profession?

A. Attorney-at-law.

[fol. 416] Q. And where do you practice?

A. East St. Louis, St. Clair County and adjoining counties, and the Federal Court in our district, before the Interstate Commerce Commission, various Commissions of the State of Illinois.

Q. Have you ever been an officer of any Bar Associa-

A. Yes, I have been president of the East St. Louis Bar Association.

Q. President of the East St. Louis Bar Association.

Were you ever nominated for any office?

A. Yes, for Circuit Judge of our District on the Republican ticket.

Q. You were not elected, the other day?

A. No, sir.

Q. Do you know Mrs. Stewart!

A. I have met Mrs. Stewart twice.

Q. And where did you first meet her?

A. At her home with a Mrs. Viola Couch, whom I was representing at that time in a suit against the Southern because of loss of her husband, who was also a switchman, I believe, and worked with Mr. Stewart at one time.

Q. You mean Mr. Couch?

A. Mr. Couch was also a switchman and worked with Mr. Stewart. Mrs. Couch took me out to Mrs. Stewart's house.

Q. Now, on November 30th, did you meet Mrs. Stewart! [fol. 417] A. I did.

Q. Where? A. In Roland Wiechert's office.

Q. How did you happen to go there?

A. Oh, maybe a day or two previous to the date I went there, which I believe was the 30th, from the testimony I just heard, I don't remember that date.

Q. The 30th of November, 1937?

A. That is right. I believe it was Bruce Campbell asked me if I would, as attorney for Mrs. Stewart, file a petition to have a settlement approved in the Probate Court, and to handle the approval of the same, and I told him I would if Mrs. Stewart desired me to do it, that I would be glad to, and told him what I would consider should be paid me for doing it, and he said well, that Mrs. Stewart was coming in, and that if they wanted me to handle the matter; she wanted me to, why they would call me. So on the morning of the 30th, Roland Wiechert called me and told me to come up to his office. My office is on the third floor of the same building [is he] in. His office is on the sixth floor.

Q. And when you got in there, do you remember the

conversations that were had?

A. Well, there was probably several conversations, I can't remember the exact wording. I know that Mrs. [fol. 418] Stewart was present when I got there. Roland Wiechert was there. I was introduced to her daughter and son-in-law, Mr. and Mrs. Hamm. I believe Haun, claim agent for the Southern was there. I believe that is all that was there at the time, and I asked Mrs. Stewart if she wanted me to represent her in handling the settlement in the matter, and she said yes, and I know that we, the petition and order and voucher were all there prepared, I did not prepare any papers, they were all prepared, but I did read them over, read everything over out loud to Mrs. Stewart and Mr. and Mrs. Hamm, and I believe they, I believe Mrs. Stewart read them over herself in the office there after I finished, although I do not know that she read everything over.

Q. How long were you in the office?

A. Oh, I would say an hour, possibly. I would not know exactly, probably an hour or so.

Q. Then after that—now, in the office, while you were there, was anything said about Mr. Hamm losing his job?

A. Not while I was in the office. The only conversation that I recall, there was much about, was relative to attorney fees for Mr. Noell, and whether the Southern Railroad would protect Mrs. Stewart in the event Mr. Noell made a claim against her.

[fol. 419] Q. And what was said about that?

A. The statement was made by either Mr. Haun or Mr. Wiechert, or maybe both of them, that they would not put that in writing, I recall that part of it, but that they would absolutely protect here in the event she had to pay any attorney fee to Mr. Noell, they would reimburse her. Now, I do not, can't recall the whole conversation. It has been a year and a half ago.

Q. Mrs. Hamm, I think you said that she said in your presence to Mr. Wiechert, that it did not seem fair to "bring my husband in it and his job in it", that Mr. Wiechert replied, "it could be done and it had been done".

A. Well, if that conversation took place I do not believe it was in my presence, at least I do not recall it. I have no recollection of that having been said there.

Q. Have you any recollection of Mr. Hamm's job being brought into the conversation in any way, that is, that if they did not settle that he would lose his job?

A. Not while I was there, I have no recollection of it,

at least.

Q. Would you say that it happened?

A. No, I would say that it did not happen in my presence. I would not say it did not happen up there that morning, but I do not think it happened in my presence.

[fol. 420] Q. You have no recollection of it?

A. I have no recollection of it at all.

Q. You have a recollection of the conversation that they would protect Mrs. Stewart from any attorney fees that Mr. Noell might have?

A. Yes. I have an absolute recollection of that.

Q. Do you hold any office?

A. I have been United States Commissioner in the Eastern District of Illinois since November, 1926.

Q. Now, you went over to the Probate Court with Mrs.

Stewart, did you? A. I did.

Q. And when you got over there, did you handle the proceedings for Mrs. Stewart? A. I did.

Q. Did you go up with her to the Clerk to have her sign-

it and make an affidavit! A. I did.

Q. Now did—I will ask you if Mrs. Stewart ever said to you at any time there that the settlement was not satisfactory to her? A. No, sir, she did not.

Q. Did she ever say that either in Mr. Wiechert's office

or in the Probate Court?

A. She did not say it in my presence. I say, she might have said it some other time, but she did not say it in my [fol. 421] presence.

Mr. Davis: I think that is all.

Cross-Examination.

By Mr. Hay:

Q. When you were called into this case, it was after the negotiations for the settlement had been carried out, that is true, isn't it?

A. I think that is right, sir.

Q. You were called in by Mr. Campbell or Mr. Wiechert?

A. One of the two, one of the two of them spoke to me, a day or two before, I am not certain which.

Q. And your fee was paid by the Southern Railroad?

A. My fee was included in the same voucher,

Q. Yes. A. That is right, paid by them.

Q. And what you did was to help carry out the formali-

ties of the settlement, that is true, isn't it?

A. Well, I guess you could call it that. I presented it to the Probate Court, and of course would have closed, if there had been anything additional in closing the estate I would have done that for that same fee.

Q. But so far as negotiating the settlement was con-

cerned, you had nothing to do with that?

A. Absolutely nothing.

Q. You did not undertake to advise Mrs. Stewart one [fol. 422] way or the other as to whether she should make the settlement or not, did you?

A. No, sir, I did not.

- Q. And at the time you knew that Mr. Noell was her lawyer? A. Yes, I believe I did.
- Q. Yes. And did you know also that the case was set for trial in about a week?

A. I do not know whether I did or not, Mr. Hay. I

might of, or I might not of.

- Q. Judge Davis asked you a while ago whether or not she said that the settlement was not satisfactory to her. You testified in the hearing before Judge Moore on the motion to reinstate this case on the docket, did you not?
 - A. That is right.

Q. I will ask you to refresh your memory, if at that time this question was asked and this answer given:

"Did she say at any time that she did not desire to settle?

"A. There was some talk about the settlement but I do not remember her saying she did not want to settle. She did not appear very anxious and still it seems she wanted to settle."

Is that about right?

A. I think it is, yes, sir.

[fol. 423] Q. .. That is about right?

A. You understand, this has been a year and a half ago since I was in the room here, and I—

Q. Then again:

"The Witness: No, outside of the general impression that she seemed to want to settle it and did not want to settle it, I do not know. She did not appear to object, and after we got up to the Probate Court, there was no objection made by her at all, that I know of."

That is about in accordance with your recollection, isn't it?

A. I think it is, yes, sir.

Q. She seemed somewhat uncertain about it, didn't she?

A. No, it is kind of hard to explain. It appeared to me, as I now recall it, that she was greatly agitated over whether or not she did settle she would not have to pay an attorney fee out of her five thousand dollars.

Q. Now, when you were representing her, I believe you

stated here. A. That is right.

Q. In the negotiation, and when she requested that this agreement of the railroad be put in writing, didn't you, as her lawyer, insist that that be done?

A. I asked them to put it in writing, yes, sir, and they [fol. 424] refused to do it before we ever went to Belleville.

Q. I see. You are, of course, on friendly terms with

Mr. Campbell, Mr. Wiechert?

A. I am on friendly terms with probably 185 lawyers in St. Clair County, Mr. Hay, which is all of them.

Q. And your office is right close by

A. We are in the same building with probably thirty or forty other lawyers in the building.

Mr. Hay: I see. That is all.

Redirect Examination.

By Mr. Davis:

Q. Have you ever known Bruce Campbell to break his word?

Mr. Hay: I object to that.

The Court: Sustained.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

The Witness: Is that all?

Mr. Davis: May Mr. Felsen be excused?

The Court: Is there any objection to Mr. Felsen being excused?

Mr. Hay: No.

Mr. Noell: No.

(Witness excused.)

[fol. 425] Bruce A. Campbell, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, in sur-rebuttal, as follows:

Direct Examination.

By Mr. Davis:

Q. Mr. Campbell, won't you please state your name?

A. Bruce A. Campbell.

Q. And of what firm are you a member?

A. I am a member of the firm of Kramer, Campbell, Costello & Wiechert.

Q. Where do you live?

A. I live in Belleville, Illinois. My office, however, is in East St. Louis, Illinois.

Q. And you practice at East St. Louis, Illinois and in

Missouri, also, do you?

A. Well, I sometimes—I do practice in Illinois generally; and I sometimes practice in Missouri in connection with Missouri lawyers.

Q. Now, your firm had charge of this case of Stewart vs. the Southern Railway Company, did you not?

A. Yes, sir.

Q. And when was the first time that you knew any-

thing about it, I mean about the settlement?

A. Well, I knew generally that Mr. Haun was trying [fol. 426] to settle the case. I had one conversation with Mr. Hamm, the son-in-law of Mrs. Stewart, and one very short conversation with Mrs. Hamm. Those are the only conversations I had outside of with members of my own firm, and with Mr. Haun. I never knew Mrs. Stewart until long after this litigation started.

Q. You knew Judge Howell, did you not?

A Intimately for about forty-eight years. I knew him when we lived in the country together, neighboring counties.

Q. Down in Southern Illinois? A Yes, sir.

Q. Now, did Judge Howell telephone you on the latter

part of November, 1937?

A. I could not give the exact date. My recollection is it was sometime in November, 1937, I received a telephone call from Mr. Howell in which he stated to me that he had had a conversation with Mr. Hamm, that some question had arisen in their conversation about the settlement of attorney fees, that he had told Mr. Hamm that he could come over and see me, and that anything I told him would be carried out, that was what Mr. Howell told me. That was the first time I ever knew that Mr. Howell had had a conversation or was going to have a conversation with Mr. Hamm or anyone else connected with this matter.

In a little while Mr. Hamm appeared and came into my [fol. 427] office. I talked with him and he stated to me that what they were worried about was whether they would be liable to any attorney fees in case they settled the case. I told Mr. Hamm that the first question for them to determine, Mrs. Stewart and the family, was whether or not they were willing to accept five thousand dollars in settlement of the case. Mr. Hamm stated in reply to that, that that is all they had wanted at any time, provided it came clear to them, free and clear of attorney fees.

He then spoke of the fact that they were worried about the possibility of being compelled to pay attorney fees to

Mr. Noell if the case were settled, and that they wanted to be assured that that would be paid. I told him that we would guarantee Mrs. Stewart that if she was legally compelled to pay any attorney fees to Mr. Noell, that the Southern Railway Company would reimburse her for that amount provided we were given the privilege of defending any legal liability for such attorney fees either in the Probate Court or otherwise. He said that that was fairly satisfactory, and we then got in some general conversation, I had thought that I had known his father in the old days, and we talked it over. He concluded that probably we did. and engaged in general conversation, and he left the office. [fol. 428] That is the only time that I ever had any conversation with anybody connected with the plaintiff's side of this case, or any of the Stewart family with the exception of the short conversation that I had some time later with Mrs. Hamm, and that was an occasion when I went up in the front part of the office where the stenographers are, and there was a lady there whom I did not know. She said she was Mrs. Hamm. She had a telegram, or spoke of a telegram, now I am not sure whether she showed me the telegram or whether she told me about it, but at any rate, I learned from her that she, that her mother, Mrs. Stewart, had a telegram from Mr. Haun, from somewhere outside of East St. Louis, asking her to meet her that day in his office, which is in the same building that mine is, and she asked me if it would make any difference if she came to see him at some other time. I told her that I was sure it would not, and she arranged to come back at some time, at some future day, I think the next day, I would not be sure about that, and I told her I'would leave a note on Mr. Haun's desk in his office as to when Mrs. Stewart would return.

Those were the extent of my conversations with any of these people.

[fol. 429] Q. Mr. Campbell, in your conversation with Judge Howell, was anything mentioned about Mr. Hamm losing his job if he did not bring Mrs. Stewart to the office, or if she did not settle?

A. Absolutely nothing of that kind was mentioned by Judge Howell, or suggested by him or by me.

Q. Now, in your conversation with Mr. Hamm, when he came over to the office, did he mention or did you mention anything about losing his job?

A. Not a word of that was mentioned by him nor by me, nor would I mention such a thing to any employee of

any company.

Q. Now, was anything said to him, to Mr. Hamm, by you or by Mr. Hamm, did Mr. Hamm say to you, "It did not seem fair to bring him into it", and that he could lose

his job, and it had been done?

A. Not a word of that kind about loss of a job. There was one further thing said by Mr. Hamm, that I overlooked a while ago. He did say that whatever sum that Mrs. Stewart, that the family wanted her to have all of it, without the children getting any of it, and I told him that I felt sure that that could be arranged if they all went into the Probate Court and asked that the full amount of it be apportioned to Mrs. Stewart and none to the children, that if [fol. 430] they consented to it I felt sure that the Court would grant such an order.

Mr. Davis: That is all.

Cross-Examination.

By Mr. Hay:

Q. Mr. Campbell, it is true, is it not, under the Federal Employers Liability Act, there being no minors, all of the

money would go to the widow, would it not?

A. Well, I am not so sure about that, Mr. Hay. I would not want to enter into a discussion of the law. I think that any court under such circumstances, where the adult children did not have any support from the deceased, that probably any court would so apportion it. But, as I remember the statute, it provides for, that it be for the benefit of the

Q. Widow and minor childen?

A. Widow and children.

Q. That is minor children?

A. Does it say minor children?

Q. Yes.

A. I do not remember as to what it said.

Q. I think that is the situation.

A. I am not sure about that. An examination of the statute would disclose it.

Q. You were not present the day this settlement was finally consummated?

A. I was not.

[fol. 431] Q. I believe you represent the Terminal as well as the Southern Railroad?

A. Well, yes. We are attorneys in Illinois for the Terminal, at that time, under Mr. Pierce, and Mr. Howell. At this time under Mr. Pierce and others connected with the company, legal representatives in Illinois.

Q. You represent some other railroads also?.

A. Oh, yes.

Mr. Hay: That is all.

Mr. Davis: That is all.

(Witness excused.)

H. B. HAUN, a witness of lawful age, having been here-tofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further, on behalf of the defendant, in sur-rebuttal, as follows:

Direct Examination.

By Mr. Davis:

Q. Mr. Haun, won't you please state your name?

A. H. B. Haun.

Q. And where do you live?

A. In Webster Groves, Missouri.

Q. And your business is Assistant General Claim Agent for the Southern Railway Company?

[fol. 432] A. Yes, sir.

Q. And where is your office?

A. 619 First National Bank Building, East St. Louis, Illinois.

Q. Now, Mr. Haun, do you remember the time that Mr. Stewart died? A. Yes, sir.

Q. And after his death, did you go to see Mrs. Stewart?

A. Yes, sir.

Q. How soon after his death?

A. Oh, probably a week or so, Mr. Davis. I can't remember, I can't be positive as to the exact time.

Q. And where did you see her!

A. She was at the home of her daughter, Mrs. Hamm, on Gaty Avenue in East St. Louis.

Q. And what was said at that conversation?

A. Well, that was a visit, the purpose of that visit was more or less to get acquainted with Mrs. Stewart, because I realized we had business to transact with her later on, at a time to be determined by her, just part of a routine meeting with the party with whom I was going to have to do business.

Q. Now, when did you next see Mrs. Stewart?

A. Well, I can't tell you that. It was the next few weeks, I would say, after that.

Q. And what was the purport of that conversation? [fol. 463] A. To enter into negotiations for the settlement of this claim.

Q. And what did you say to her?

A. That would be awful hard for me to say, Mr. Davis. Everything that was said; nothing formal about it. There was a lot of interruptions, people from across the street came in, sit, talked a while, get up and leave; whether or not there was any offer of settlement made at that time or not I would not say.

Q. Now, when did you next see Mrs. Stewart?

A. As I recall, the next time I went to see Mrs. Stewart was the day that some of her relatives from Coulterville had come up to get her to go down to the country with her.

Q. Do you remember when that was?

A. Well, it was in April, sometime following this accident in February.

Q. Did you see her at that time?

A. Yes, sir, but not to say much to her. She was just almost ready to leave, the car was there waiting on her, and she was making the final preparations to leave home, to go down to the country.

Q. To go down to Coulterville?

A. Yes, sir.

Q. And did she tell you she was going to Coulterville? [fol. 434] A. Either she or Mrs. Hamm told me. I have forgotten which. I think maybe Mrs. Hamm told me that.

Q. Did she tell you where she was going?

A. Yes, sir, told me the names of people she was going to be visiting.

Q. She told you the names of people she was going to be visiting? A. Yes, sir.

Q. Do you remember what day of April that was?

- A. No, sir, I do not. It was sometime prior to the 20th, however.
 - Q. And how long prior to the 20th?

A. Oh, I would say within a week.

Q. Now, when was the next time that you saw Mrs. Stewart?

A. On the 20th day of April, 1937.

Q. On the 20th day of April, and where did you see her?

A. At Coulterville.

Q. At whose home was she?

A. At this lady who testified here Saturday, Mrs. Mc-Kelvey, I believe is the name.

Q. The lady that testified "you had better not"?

A. That is the lady, yes, sir.

Q. Now, did you go to Mrs. McKelvey's home?

A. Yes, sir.

Q. And did you get into the house? A. Yes, sir.

Q. And did you—what happened there after you got in the house?

[fol. 435] A. Why, as I recall, Mrs. McKelvey is the lady who answered the door, and I told her my name, and told her I wanted to see Mrs. Stewart if she was there, and I was told she was there, and presently Mrs. Stewart showed up, at which time I invited her to go out in the automobile where we could talk privately about a matter that I regarded concerned no one but she and myself, and she went.

Q. And she went? A. Willingly.

Q. And then did you talk about this case?

A. That is all we talked about, for almost three hours.

Q. What was the purport of your conversation?

A. Well, we agreed on the settlement for four thousand dollars. She told me she had been appointed administratrix. I told her I had authority from the company to pay her four thousand dollars, and the only reason the papers were not signed right then and there, she had left her letters of administration, I think she said, in the sewing machine drawer in East St. Louis, on the Gaty Avenue address. That is the only reason the case was not closed then and there with Mrs. Stewart.

Q. And you would not settle unless you knew that she

had been appointed administratrix?

A. I did not question that, but I am not allowed to draw a draft until I can make it correspond with the name on

[fol. 436] the letters of administration. It has to be letter perfect with those on the letters of administration.

Q. Let me ask you this question: Did you know at that

time whether it had, whether suit had been filed?

A. No, sir.

Q. Do you know whether it had been filed or not?

A. No, sir, I do not.

Q. What was the date of its filing?

A. I learned it the next day, however, filed later.

Q. This is on the face of it, and it shows that suit was filed on April 20th.

A. Then, I learned the following day that suit had been

filed. I'did not know it that day.

Q. You did not know it at that time?

A. No, sir.

Q. And you and Mrs. Stewart agreed upon a settlement that day?

A. Yes, sir.

Q. Now, did you know that she had an attorney?

A. No, sir.

Q. Did she tell you that she had an attorney?

A. No, sir.

Q. Then what did you do—how long were you in that automobile?

A. Oh, probably two or three hours, Mr. Davis, most of the afternoon. As I recall I got down there shortly after [fol. 437] lunch, and I know I got back to Belleville that afternoon, just in time to get a certified copy of that letter before the Probate Court Clerk's office closed, which I think is 5:00 o'clock, and it is probably forty or fifty miles down there.

Q. To Coulterville? A. Yes, sir.

Q. And you did get a certified copy of it that day, did

you!

A. Yes, sir, that same day, and agreed to meet her at 9:00 o'clock the next morning and close the matter out at Mrs. McKelvey's.

Q. Did you meet her the next morning?

A. Yes. I went to McKelvey's, she was not there. She was at another relative two or three blocks away. I went over there, as I recall Mrs. McKelvey went over to show me where she could be found, and Mrs. Stewart was in bed at this other address, I have forgotten the name of the

people, and she told me she was nervous and not feeling well and did not care to discuss it. I told her that would be all right, I would see her later, and I left. I was not in the house much longer than it would take me to tell about it.

Q. Just a few minutes? A. That is all.

Q. And then what happened?

A. Well, when I learned, the first knowledge I had of [fol. 438] the suit was between Coulterville and Belleville, stopped in the filling station and got some gasoline and a cup of coffee, Coca-Cola or something of that nature, and while in this cafe, which was run by the same man who operated the pumps out there, I saw a current, or a morning Globe daily newspaper here, where I noticed the filing of this suit. That was on the 21st day of April, 1937.

Q. Now, then, when was the next time you saw Mrs.

Stewart ?

A. Well, I did not see Mrs. Stewart any more, to speak to her, I do not think until the 30th day of November, whatever day it was the settlement was consummated over there, following this April.

Q. And on the 30th day of November, where did you

see her?

A. It was in Mr. Wiechert's office in the same building in which my office is located.

Q. And when you saw her, how did you happen to get into Mr. Wiechert's office?

A. Well, in the meantime, between this time I saw her in Coulterville, and then on this date, I had learned that Mr. Hamm was the, as we say, "the nigger in the woodpile" down South, was blocking this settlement.

I learned that through an informant of mine who had talked to Mrs. Stewart's son, who is a waiter at the Coro[fol. 439] nado Hotel, and it was then that I went and salled on Mr. Howell and said this to Mr. Howell, I said,
"Mr. Howell, we oftentimes have cases where we have our own employees who are blocking these settlements. Here we have a case where we know that is what has happened, and I wish you would talk to Mr. Hamm about that."

Q. What did you tell him?

A. Just what I told you.

Q. To talk to Mr. Hamm about it. Did you tell him anything about having information that Mrs. Stewart wanted to settle for five thousand dollars?

A. Oh, yes. I told him she wanted her money and was

willing to settle for that.

Q. How did you get that information?

A. Through this same informant.

Mr. Hay: Who was it?

A. Mrs. Stewart's son, a waiter at the Coronado Hotel. He said his mother is wanting to settle it.

Mr. Hay: Just a moment. Did you hear him say that?

A. No.

Mr. Hay: I move that be stricken out.

The Court: Sustained.

To which ruling of the Court, the defendant, by its coun-[fol. 440] sel, then and there, at the time, duly excepted.

Q. I am asking for the conversation with Judge Howell. Did you tell Judge Howell in that conversation, that the thing that was blocking Mrs. Stewart was the fact that they were afraid of the attorney fees, that they might have to pay Mr. Noell?

A. No, I do not recall that. I just told him Hamm was

blocking the settlement, that is the way I recall it.

Q. Hamm was blocking the settlement?

A. Yes, sir. I told him that was my information.

Q. Now, then afterwards you made—and when was

that, if you know, that you saw Judge Howell?

A. No, I do not. It must have been—I am guessing now, I would say around the 1st of November, something near that date.

Q. And then what after that, what happened?

A. Well, I do not know. In the next ten days or some such matter as that, Mr. Campbell came to my office one day and told me that Mr. Hamm had been over to see him in connection with it, and he said that Mr. Hamm had told him yes, they were perfectly—

Mr. Hay: I object to what he said Mr. Hamm told him.

Q. Anyway, you found out information that—then, did

you send a telegram to Mr. Hamm?

A. Yes, sir. I first learned that that was the date con[fol. 441] venient for Mr. Campbell, and I was in Indiana
at some point, I forget where it was, if you got the message I can tell you what point. It seemed to me like Indiana. I have forgotten, but I was out of town and Mr.
Campbell indicated that date would be satisfactory to him,
because he is in and out.

Q. And you sent that to him? A. Yes.

- Q. What happened after you got up to Mr. Wiechert's office!
- A. Well, Mrs. Stewart and her daughter and her husband had to pass my door to get [—] Mr. Campbell's office. I was at the end of the hall, but I am on the side. They had to pass my door and I saw them go by. I gave them enough time to get in there, and then I went on in. They were in Mr. Wiechert's office. Mr. Wiechert was there. Mrs. Stewart and Mrs. Hamm and Mr. Hamm, and I spoke to them and some mention was made about settling the case, and Mrs. Stewart said that there was not but one thing that caused her to hesitate on the proposition, and that was the question of the attorney fees to Mr. Noell, and Mr. Wiechert and I both assured her that the Southern Railway Company would stand behind her, and Mr. Noell, on any legal attorney fees that he might present or might have.

Q. That is, if Mr. Noell would get a judgment against [fol. 442] her or against the Southern Railway, either one

of them, that you would pay it?

A. That is right. That was our proposition, we proposed to leave it go. She further stated, Mrs. Stewart did, that she would be doggone glad to get away from Mr. Noell, and asked me if I would give her a pass to go to Florida if she settled with me. I told her I could not give her a pass, but that if we settled this matter without going through the court, I would use my influence to have her pass privileges undisturbed, the same privileges she had during his lifetime.

Q. The same privileges during what?

A. The same privileges she had in that respect during his lifetime, and I did do that.

Q. How long did you stay in there?

A. Oh, I was in and out, Mr. Davis, until—I was not in there when Mr. Felsen came in, as I recall, but I was there while he was there.

Q. Did you go to Belleville with them?

A. No, sir. These people had planned on being there the day before, and I had to take this draft, and papers that I dated the day before, and destroy them, and make a new set, that is one of these papers were already in readiness, these people had first told us they would be there [fol. 443] the day before, and Mrs. Hamm called me on the appointed day and said they would not be there until the next day. That explains how the papers were already in readiness when they got there.

Q. Now, did you hear any conversation with respect to

Mr. Hamm's job! A. None whatever.

Q. Did Mrs. Hamm turn to you and say, "It does not seem fair to bring my husband in it and his job in it", and then Mr. Wiechert turn to her and say, "It could be done and had been done"?

A. I did not hear that any time I was present.

Q. Was anything said about Mr. Hamm losing his job in any way, shape or form?

A. Not that I know, not to my knowledge.

Q. That, if it was, you did not hear it?

A. No, sir, I most assuredly did not.

Q. Did you say anything to her about Mr. Hamm losing his job?

A. Of course not. I would not say a thing like that.

Q. Did Mr. Wiechert do it, that you heard?

A. No, no. No one did.

Q. No one did? A. In my hearing.

Q. Did Mr. Hamm or Mrs. Hamm say anything about losing his job?

A. Not to me or in my presence.

Q. Did Mrs. Stewart say anything about Mr. Hamm los-[fol. 444] ing his job if she did not settle, or if they did not

bring her to the office? A. Not in my presence.

Q. Mrs. McKelvey said that, I believe, that when you were over there that you offered, I don't remember whether it was four or five thousand dollars, and said that you would spend ten thousand dollars to see that Noell did not get anything. Did that conversation take place?

A. No, sir. Ten thousand dollars was mentioned in Mrs. McKelvey's presence, but not in connection with beating Mr. Noëll.

Q. What was it?

A. I took with me, that was on the 21st or 20th—yes, the 21st day of April, and I took from my office with me down to—

Q. Who was present at this conversation?

A. Well, I am confused, just a moment, now. It was not on the 21st either.

Mr. Hay: Just a moment. I was not following. Did you ask him if he made the statement that Mrs. McKelvey said, that—I was not following him on it.

Mr. Davis: Yes, sir.

Mr. Hay: He said he did not?

Mr. Davis: Yes, sir.

Mr. Hay: Then I object to any further statement about that, if he denies making that statement.

[fol. 445] Mr. Sheppard: Your Honor, he certainly has a right to explain what statement he did make.

Mr. Hay: I think not.

Mr. Sheppard: He is not to be cut off at the hip pockets in that respect.

The Court: Overruled.

Q. What was the statement that you made?

A. I was advised a moment ago, when it was this took place at Mrs. McKelvey's house, was the last time I had seen Mrs. Stewart, was the morning she was ill, that she had rode to Salem the night before, was about a week later. I go down to Mrs. McKelvey's house and I take with me a docket record we keep in our office, and I learned in the meantime, of course, Mr. Noell represented this lady, at least the paper said so, the newspaper, and I showed Mrs. McKelvey this docket record. She asked me what I knew about Mr. Noell. I told her nothing except what I had heard, never seen the man in my life, never had any dealings with him, but I did have a record in my office, which started in 1925, ended up there in 1934, in a case

where Mr. Noell had guaranteed one of the widows of one of our employees ten thousand dollars, guaranteed her ten thousand dollars if she would permit him to handle her ease, and in May, 1934, the Southern Railway won the [fol. 446] case and Mr. Noell had not paid the woman ten thousand dollars. That is where she got the ten thousand dollars. That was the Woods case against the Southern Railway, a man killed in Indiana.

Q. But was anything said in Mr. Wiechert's office when you were in there about Mrs. Stewart settling or not set-

tling, as she wanted to?

A. Yes, sir. I said something to Mrs. Stewart about it.

Q. What was said?

A. I told her there was nothing compulsory on her part to settle this case, that the only thing about was certainty, that she knew she had five thousand dollars if she did settle. If she went to court she might get less, or get more, but I could not tell her how much more or how much less, or when, just the uncertainty of the thing.

Q. Here she had the five thousand dollars?

A. That is it.

Q. And no attorney fees to pay?

A. That is right, clear to her.

Mr. Davis: I think that is all.

The Court: Announce a five-minute fecess.

(Recess, five minutes.)

Cross-Examination.

By Mr. Hay:

[fol. 447] Q. As I understand your testimony, the last time you saw Mrs. Stewart before you saw her over in the office of Mr. Campbell and Mr. Wiechert, was down at Coulterville, Illinois on April 20, 1937, is that right?

A. April 21st.

Q. You saw her the morning of the 21st?

A. Both days, the 20th and 21st.

Q. The conversation you had with her was on the 20th of April? A. Yes, sir.

Q. You had a talk with her that day, you say, for about

three or four hours?

A. Two or three hours, about three hours.

Q. Out in the car, is that right? A. Yes, sir.

Q. You were invited in the house, weren't you?

A. I was in the house.

Q. Did the lady order you out of the house?

A. No, sir.

She asked you to come into the house, didn't she?

A. Yes, sir.

But you asked the lady to go down and talk to you in the car, didn't you? A. Yes, sir.

Q. You say you did not know that she had a lawyer at the time? A. That is right, I did not know it.

Q. Didn't she tell you she had a lawyer?

[fol. 448] A. No, sir.

She told you that she had letters of administration?

A. Yes, sir.

Or that she had been appointed administratrix?

A. Yes, sir.

You did not ask her if she had any lawyer assist her in being appointed administratrix? A. No, sir.

Q. Why don't you know that she told you that Mr.

Noell was her lawyer?

Mrs. Stewart never told me that.

Q. And didn't you tell her when she told you that, that you would not deal with Mr. Noell?

A. No, sir. I did not tell her that. I told her that on

the 30th.

Q. How?

I told her that on the 30th of November, but not at Coulterville, because at Coulterville I did not know that he had been employed.

And do you tell this jury that she agreed on the

settlement of four thousand dollars?

A: Yes, sir, on April 20th, 1937.

That day? A. Yes, sir, in the automobile. Q.

In the automobile? A. Yes, sir.

The next day, do you tell us that she said she did [fol. 449] not want to talk to you?

She was in bed, said she was ill at the appointed

hour, at 9:30 in the morning.

Yes. Did you go in to see her at that time?

A. Yes, sir.

Q. Or just learn that she was in bed?

A. I saw her, walked up to the side of the bed where she was, held her hand, clutched her hand, told her I hoped she would feel better.

Q. From that day, the 21st, until November 30th, you did not see her again? A. Not as I recall.

Q. You did learn, you say, on the 21st that she had

filed a suit? A. That is right.

Q. And then do you tell me that you went back down there after you learned that she had filed a suit?

A. Yes, sir.

- Q. To see her?
 A. Yes, sir; but she was not there.
- Q. You did not go to see her lawyer? A. No, sir.
- Q. You did not try to see her lawyer? A. No, sir.
- Q. But then you knew she had a lawyer, didn't you?

A. That is what the newspapers say.

Q. Why, certainly, instead of getting in touch with her [fol. 450] lawyer you go back to see her.

A. I attempted to see her; I did not see her,

Q. You attempted to see her. And you tell this jury that you had with you then Mr. Noell's record in handling cases of this kind?

A. No, sir, I had my record.

Q. You had your record? A. My office record.

Q. And you had a record, did you, which showed that Mr. Noell had lost one of those cases, is that right?

A. Yes, sir, after nine years of litigation.

Q. Did you have the records showing the cases that he had won?

A. That was the last case he had had against us.

Q. My question is did you have any record showing the cases that he had won?

A. No. I only came here in 1933.

Q. Well, you knew he had won a lot of cases of this kind, didn't you?

A. No, sir, no, sir. I did not know that,

Q. What?

A. I say, no, sir, I did not know that.

Q. Why, don't you know that you knew his record of winning cases, numerous death cases, with verdicts running all the way from twenty to fifty thousand dollars?

Mr. Sheppard: Your Honor, we object to that.

The Court: Sustained. I do not think you have any [fol. 451] right to state the size of verdict. I think it is highly improper, Mr. Hay.

Q. Well, but you did not have anything to show any case that he had won, did you? A. No, sir.

Q. Why did you take that record down there to show

Mrs. Stewart of a case that Mr. Noell had lost?

A. Because I thought it would be to Mrs. Stewart's interest to have as little as she could possibly have to do with Mr. Noell, based on that record.

Q. On that record? A. Yes, sir.

Q. Did you try to find out whether that record was typical of the cases that he handled?

A. It was the last case he had against us.

Q. My question is, did you try to find out whether or not that record was typical of the cases that he handled?

A. Typical of the one against us. I do not have cases-

Q. Don't you know just a short time before this, that he had gotten a verdict for twenty thousand dollars?

Mr. Davis: Your Honor, I object-

Mr. Hay: I think under the circumstances I am entitled to show that.

The Court: Let him make his objection.

Mr. Davis: We object to it.

[fol. 452] The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. Didn't you know that just a short time before that he had gotten a verdict against the Southern Railroad for twenty thousand dollars?

A. I know that he had not since 1933, since 1925, I mean.

Q. Are you familiar with the Grant case?

A. No, never heard of it.

Q. It happened out of Belleville?

A. Never heard of it.

Q. Now, did you try to find out? You say you wanted, you thought it was in her interest to know about Mr. Noell?

A. I certainly did.

Q. Didn't you know that Mr. Noell's record and reputation was that of a man who with a high degree of success and fidelity, had represented people who had death claims and personal injuries claims against railroad companies? A. That is not the way I heard it.

Q. Don't you know, as a matter of fact, that the very fact that he had had a record of unprecedented success in this community, was the reason why you and other railroad men were very bitter against Mr. Noell?

Mr. Davis: I object to that, Your Honor, because I do not think he ever had any unprecedented success.

[fol. 453] The Court: Well, we are not going to try that.

Mr. Davis: No.

Mr. Hay: No.

Mr. Sheppard: May it please Your Honor, that is another ground of objection.

Mr. Hay: We are perfectly willing to try that, Your Honor.

The Court: Well, I think the objection will be sustained to the question in the present form.

Q. Did you try to look up his record since you were wanting to advise this good woman about whether she should have anything to do with Mr. Noell or not?

A. No, sir. It came to me unsolicited.

Q. And unsolicited you took it down to this woman,

didn't you? A. No, not unsolicited.

Q. Don't you know that the reason you took it down there was in order to scare this woman into taking what you offered?

A. No. I have never tried to frighten anyone, Mr. Hay,

in connection with a claim.

Q. Will you look at this jury, look at them, and tell us this jury on your oath, that the reason you did that was your interest in this woman? Look over and tell them.

A. It was the interest of Mrs. Stewart and the South-

ern Railway, our mutual interest.

[fol. 454] Q. Oh! And in the interest of Mrs. Stewart and the Southern Railway, you got Mr.—this bird over here—

Mr. Sheppard: Now, Your Honor, we object to that remark.

The Court: Sustained.

Mr. Sheppard: And ask that counsel be rebuked, and I think, Your Honor, we will move for a mistrial. That is not the first time that occurred in this record.

The Court: Overruled, proceed.

Mr. Sheppard: Exception.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. Well, this gentleman over here with this fancy tie on. I will ask you if it was in the interest of Mrs. Stewart and the Southern Railroad that you got him to see if he could use his influence in getting her to settle the case.

A. I see two or three fancy ties over there, Mr. Hay.

Q. You know who I am referring to. I am referring to your friend, Renow. A. Yes, sir.

Q. You got him to do it? A. Yes, sir.

Q. In the interest of Mrs. Stewart and the Southern

Railroad! A. Yes, sir.

Q. Was it in the same interest that you got Mr. Hanley, down in Kentucky, to try to see if he could get a settle[fol. 455] ment for you? A. Yes, sir.

Q. And then finally you go to Mr. Howell, and get him to call Mr. Hamm in there, you did not go to Mr. Hamm

yourself, did you!

A. No, sir. I have seen Mr. Hamm, talked to him at his home in connection with the matter Mrs. Stewart and I used to talk about.

Q. Did you talk to him after you talked to Mrs. Stew-

art down at Coulterville?

A. No, sir. Not until November 30, 1937.

- Q. Would you mind telling the jury why you did not go to Mr. Hamm instead of asking Mr. Howell to bring Mr. Hamm in?
 - A. I thought that was the best way to handle it.

Q. Is that your only answer? A. Yes, sir.

Q. With some feeling, as I interpreted it a while ago, you said you told Mr. Howell that sometimes you found that your own employees were blocking the settlement, and you found that one of them was doing it this time, is that right?

A. That is not exactly right, Mr. Hay. That is real

close to it.

Q. Hitting at it pretty well?

A. Yes. That is not what I testified to.

Q. Well, what did you say?

A. I told Mr. Howell that oftentimes we had cases [fol. 456] where we felt that our own employees were blocking the settlement, but in this case we were certain that that was the fact.

Q. And you wanted something done about it, didn't

you? A. Yes, I did.

Q. And you wanted to do the most effective thing to get that employee in line, didn't you?

A. I don't know what line you are speaking of.

Q. I mean, to get him to favor a settlement, you wanted

to do the most effective thing you could?

A. I did not care whether he favored it or not, but I just wanted him to stop blocking it, that is all I was interested in.

Q. You wanted to get him out of the way?

A. I wanted him to stop blocking the settlement, yes, sir.

Q. And to do that you go to the head of the Legal De-

partment and ask him to call him in, didn't you?

A. No, I thought Judge Davis was the head of the Legal Department down there.

Mr. Davis: No. You are mistaken.

Q. No. Mr. Howell.

A. Well, I was under that impression, that Mr. Howell

was, that was the man I went to.

Q. But you thought that would get him out of the way, didn't you? A. Yes, sir, I thought it would, and it did. [fol. 457] Q. You were satisfied if Mr. Howell would call—

The Court: (Q.) What did you say?

Mr. Sheppard: "It did."

The Court: How?

Mr. Hay: What?

The Witness: It did. It worked, it worked all right.

Mr. Hay: That is all. That is all.

Mr. Davis: That is all.

Mr. Hay: I agree to that.

Mr. Davis: Wait a second.

Redirect Examination.

By Mr. Davis:

Q. Just explain why you got Mr. Renow in this?

A. Well, I had met Mr. Renow—I came to this country in May, 1933, and along about that same fall, either September or October, I met Mr. Renow, and formed a very close friendship, and we are still very good friends, we roomed together about two years. He is a former railroad man, Burlington. He is now in the insurance business and making a very nice success of it.

Mr. Stewart, the deceased in this case, had an accident on a crew in which he was the foreman, and Mr. J. W. Barnhill, one of his employees was fatally injured while Mr. Stewart was the foreman of this crew, along in November, [fol. 458] 1933, and Mr. Renow rode with me over to some address, I have forgotten which now, on State Street at the time that I interviewed Mr. Stewart in connection with the Barnhill accident.

I introduced Mr. Renow to Mr. Stewart. After I had finished my business with Mr. Stewart, Mr. Renow identified himself as being in the insurance business, and they talked insurance a little. I do not think he tried to sell him, but there was some conversation about that.

After Mr. Stewart was killed, Mr. Benow came in one night and I told him, I said, "Claude, do you remember John Stewart, a fellow we took the statement from on State Street in the Barnhill case?" He said, "Yes." I said, "Well, he was killed."

He told me then, he said, "I think I will go over and try to write that family some insurance."

I said, "I think that is a matter for you to decide." And the first contacts he made, so he has told me, was this connection with insurance.

Now, later, after Mrs. Stewart, you see Mrs. Stewart has never asked me for more than five thousand dollars at any time. At first, I did not have the five, as I recall. I

had twenty-five to start, then four and then the five. She had never asked me for more than five thousand dollars.

[fol. 459] Well, I did not get to tell Mrs. Stewart directly our position about it, but I told Mrs. McKelvey the day I took this docket record down there, "We will pay you that and stand between Mrs. Stewart and any attorney fee", and what I was trying to find out, and one reason I had for asking Mr. Renow to help me, was to find out why, when we had a woman there who was willing to take five thousand dollars, we were willing to pay it, yet she would not take it, I wanted to find out the proverbial nigger in the woodpile, and I found out to my satisfaction anyway, I knew Mr. Renow was trustworthy, I knew he could be relied upon. I knew he was fairly competent to find out those things for me.

Q. And he did find them out?

A. He did, yes, sir.

Q. And reported them to you? A. He did. Q. What about Mr. Hanley, down in Kentucky?

A. I went to Mr. Hanley after I found out Mrs. Stewart was down at Hodgenville, I went to Hanley because he was the only railroad attorney in town, in that small town of Hodgenville, to find out the same thing Mr. Renow later found out for me.

Q. And that was what?

A. Well, he never did find out anything for me, Mr. Han[fol. 460] ley did not, except he did tell me that the deceased
had a brother living in Salem, who I presume is that gentleman who testified here the other day, or a day or so ago. He
never could find out why, that is who was blocking it, he
had the same attitude as the rest did, that she was perfectly willing to take it, but this question of Mr. Noell
jumping in, getting his hands on the five thousand dollars was, had her upset, but he did not find out who was
blocking the settlement.

Q. But she wanted five thousand dollars clear?

A. Oh, perfectly willing to take it. Q. Provided she could get it clear?

A. That is right.

Q. And that is what you mean by blocking it, whether or not the five thousand dollars would be clear to her?

A. I do not understand that question, Judge.

Q. I say, you said you found out who blocked it?

A. Yes, sir.

Q. And you found out what they wanted?

Mr. Hay: Just a moment. J object to his telling the man what he wanted.

Q. What was it you found out?

A. I found out that Mr. Hamm was the man who was blocking the settlement.

Q. For what reason? A. I do not know his reason.

[fol. 461] Q. You do not know his reason?

A. His reasons are his own.

Mr. Davis: That is all.

Recross Examination.

By Mr. Hay:

Q. Which one of the sons was it that you referred to a while ago, son of Mrs. Stewart, was the one working out here at the Coronado Hotel?

A. I made some reference to him, yes, sir.

Q. You say you were first authorized to pay twenty-five hundred dollars?

A. As I recall that is what it was.

Q. The first offer you made was a thousand dollars, wasn't it?

A. I don't remember.

Q. And then after you found out Mr. Noell was in it, you jumped it to four, then to forty-five, and finally to five thousand dollars, didn't you?

A. No, sir.

Q. Didn't you authorize Mr. Hanley down in Kentucky to go to her and see if he could not settle for forty-five hundred dollars?

A. No, sir.

Q. But you did not offer four thousand dollars at first, did you?

A. No, I did not have it.

[fol. 462] Q. Or five thousand dollars?

A. I was handling the other man's money, Mr. Hay. You got to handle what they want you to handle.

Mr. Hay: That is all.

Mr. Davis: That is all.

Mr. Sheppard: Your Honor, give us just a minute, until we see what we want to do, will you?

The Court: All right.

(At this point there was a short lull in the proceedings.)

CLAUDE C. RENOW, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, in sur-rebuttal, as follows:

Direct Examination.

By Mr. Davis:

Q. Mr. Renow, won't you please state your name?

A. Claude C. Renow.

Q. And what is your business?

A. I am State General agent for the Massachusetts Protective Insurance Company.

Mr. Sheppard: A little louder.

The Court: Speak a little louder. The Court can't hear you. The Court and the jury and counsel must hear you.

[fol. 463] Q. And where is your office?

A. 1336 Boatmen's Bank Building.

Q. And where do you live? A. 5462 Goethe, St. Louis.

Q. How long have you been with that company?

A. About six and one-half years.

Q. Did you ever call to see Mrs. Stewart in East St.

A. Yes, sir.

Q. And how did you happen to go there?

A. Well, Mr. Haun, as he explained a while ago, told me of Mr. Stewart's death, who I had met sometime prior to that, and naturally when there is a sudden death in any family an insurance man has an opportunity to get some business.

Q. Now, when you first went there, what did you say to Mrs. Stewart?

A. Well, I expressed my sympathy, told her who I was, gave her my card.

Q. Have you a card with you? A. Yes, sir.

Q. And your name is on this card? A. That is right.

Q. 1336 to 39 Boatmen's Bank Building?

A. That is right.

Q. St. Louis, Missouri. A. That is right.

Q. State general agent, Massachusetts Protective Company, Worcester, Massachusetts, health, accident and life insurance?

A. That is right.

Q. On that card. Is that the same kind of card that you gave her?

A. That is the only kind of card they put out.

[fol. 464] Q. And did you go to see her about the settlement of this case at that time?

A. No. The first time I was there I did not say anything about the settlement, because Mr. Haun, I guess had not tried to negotiate with her.

Q. Now, when was that, the first time you were there?

A. Well, I do not recall the dates, but it-

Q. Well, how long after his death?

A. Oh, I would say two or three weeks, something like that.

Q. Now, when was the next time that you saw her?

A. I was only there twice. I was there in the evening, and I was there the next time at noon.

Q. And when was that that you were there at noon, how

long after Mr. Stewart's death?

A. Well, at the time I was there first, I found out that, where the family, that is where the boys worked, Mr. Stewart told me he had two sons and a son-in-law, he had a son-in-law who was a switchman, and the

Q. That is when you first saw Mr. Stewart, who died?

A. That is right. That is when I was with Mr. Haun the first time, and I found out Mr. Stewart's age, I did not discuss insurance with him because he was past our age limit, but the next time I was there at noon I believe Mr. Hamm was asleep, and the boys who were waiters, you had [fol. 465] to contact them at different times, and I later found that they were not living there, that they were married, and on their own, and had their own homes.

Q. Now, did you ever—you were only there at Mr. Stewart's house twice, or Mrs. Stewart's house twice?

A. That is right.

Q. One of them was during the life of Stewart?

A. No. I was there twice after Mr. Stewart's death.

Q. After his death? A. That is right.

Q. Now, what was the second time you were there?

A. Well, I was not in the house the second time I was there. I asked for Mr. Hamm, if Mr. Hamm was there, and they said yes, he was sleeping, and said, "Don't disturb him".

Q. And did you say anything about the settlement of

this case in either instance?

A. Yes. The settlement was brought up the second time I was there.

Q. With whom?

A. With Mrs. Hamm, I believe.

The Court: Who brought it up?

A. I believe I asked if she was,—how she was getting along with her settlement with the railroad.

The Court: I think you would save a good deal of time if you would give clearer answers.

- Q. Now, did you see Mrs. Stewart at, I do not remem-[fol. 466] ber the name of that town, no, if was not Coulterville.
 - A. No, sir. I was never at Coulterville.
 - Q. No. Mrs. Stewart that testified here,-

A. Mr. Stewart?

Q. Yes.

A. Yes. I saw Mr. Stewart at Mr. Haun's request. He asked me to try to find out what was the reason that Mrs. Stewart would not make a settlement.

Q. And what conversation did you have with Mr. Stewart there?

A. Mr. Stewart told me that he was an in-law, and he said, "However, she has come to me for advice", but he said, "She will listen to her two sons and be guided by what they say more than by what I say, and I would suggest that you go see them", which I did. I went to the Coronado one evening and had dinner, and while there I talked to the son, and the son informed me that the mother was listening to Mr. Hamm more than she was to what they had to say.

Q. And you conveyed that to Mr.-

A. And I conveyed that message to Mr. Haun, so therefore I assume that he took the steps to find out why Mr. Hamm was trying to hold up the settlement.

Q. Were there any other conversations you had with

them?

Well, I heard remarks made that I suggested that they get an attorney. That remark was made after Mrs. [fol. 467] Stewart told me, or her daughter, I believe it was, I do not recall which one, said that they had been run to death with lawyers, there had been at least 150 of them, they got so now they slipped up the back alley, come to the back door, tried to get an interview. I said, "Well, did you know that your husband was pretty friendly with Judge Cooke", who was a judge in East St. Louis, "Why don't you go to him and ask him his advice. I believe he would steer you right to somebody that you could depend upon". I said, "If you do not want to do that, we have a lawyer who represents our company, in fact he has represented me in a matter". I said, "He does not live in St. Louis but I know he is honorable and very reasonable, and he will understand both sides".

She wanted to know who it was and I told her. I told her it was Walter Stillwell, prosecuting attorney of Marion County, Hannibal, Missouri, who happens to be a very good friend of mine.

Q. Did you ever refuse to give your name to anybody?

A. No, sir.

Q. To Mrs. Stewart, to Mr. Stewart, or anybody else?

A. No. I believe Mrs. Stewart, Mr. Stewart said the other day I called on him and left my card. I would have no reason to call on one and leave my card and go to an[fol. 468] other and not tell my name. I have nothing to conceal or be ashamed of.

Q. You gave Mrs. Stewart your card?

A. That is right.

Q. The card I read here?

A. That is right. That is the only card I have, the Massachusetts Company.

Q. Were you ever connected with the W. P. A., the P. W. A., or the R. F. C., any of those other things?

A. I was with the Burlington Railroad until 1925. Since that time I have been in the insurance business.

Q. What position did you hold with the Burlington Railroad?

A. I was in the engine department. Naturally, Mr. Haun and I being railroad men, had a lot in common, pro and con.

Mr. Davis: I think that is all.

Cross-Examination.

By Mr. Hay:

Q. The first time you went to see Mrs. Stewart after Mr. Stewart's death, you were in company with Mr. Haun, weren't you?

A. I did not get your question, Mr. Hay.

Q. I say, were you in company with Haun, did I understand you to say, when you went to see Mrs. Stewart, the first time after Mr. Stewart's death?

A. No, sir. No, sir. I was in my own capacity in the

insurance business.

[fol. 469] Q. But you went around to talk to her about insurance?

A. I was not going to talk to her. I wanted to see some members of the family that were insurable.

Q. Was that before or after his death?

A. That was after his death.

Q. After his death? A. Yes, sir.

Q. Had you talked to Mr. Haun before you went around to see the family about insurance?

A. Never, no. There was not anything mentioned

about the claim the first time I went to see them.

Q. But you had learned that he was dead?

A. Well, Mr. Haun told me he was dead.

Q. Mr. Haun told you that? A. Yes.

Q. So you went around first to see about insurance?

A. That is right.

Q. And the next time you went around and you asked about the settlement of the case, didn't you?

A. Asked them how they was getting along.

Q. You asked them how they were getting along?

A. Yes.

Q. And you recommended finally that they get Mr. Stillwell to represent them, did you?

- A. After I was confronted with the question, or they [fol. 470] told me 150 lawyers had been there and they did not know what to do.
 - Q. Then, whom did you see next?

A. Mr. Arthur Stewart.

Q. Arthur Stewart. You went to see him?

A. That is right.

Q. You went to see the son?

A. That is right.

Q. And you saw the daughter?

A. Well, the daughter, the only time I saw the daughter was the two times I was at home.

Q. In all that you did were you trying to help Mrs. Stewart?

A. Well, I might say that naturally my mutual interest was for Mr. Haun, but after his explanation of it, as he expressed himself, that Mrs. Stewart wanted the settlement and he could not understand why somebody had got hold of her and put the stop clock on it, I told him if I could be of any assistance, or if I could find out who was doing it, I would be glad to do it, and I did.

Q. So then you went to see Mrs. Stewart, and young Mr. Stewart, and Mrs. Hamm, did you ever go see Mr.

Hamm?

A. No. I did not know that Mr. Hamm was holding up this settlement until after I had went to see the son.

Q. You found out the hours Mr. Hamm worked, didn't

you? A. Found out he worked.

Q. Yes, when he worked?

A. Well, I think they told me he worked different shifts, [fol. 471] sometimes he is on a different shift, and then he would work another shift.

Q. You found out from Haun when he worked, didn't

you?

A. No. I asked while I was at the house, his hours.

Q. And did you call at the hours when you expected him to be there, or at work?

A. Well, when I was there that first evening, he was working, and I assumed he would be there in the daytime, so that was my reason for going back about noon, because a railroad man that works from 4:00 to 12:00 naturally is up and around ready to, have his rest up.

Q. Then, you were only interested in insurance.

A. The first time I went there, because Mr. Haun had never tried to negotiate a settlement, as far as I know, at that time.

Q. So the first time was just to get acquainted with it,

wasn't it?'

A. No. The first time was to find out about insurance, where I could put my finger on them, to find out where I could see them.

Q. I see, about insurance?

A. That is right, the first time I was there.

Q. At one time did you pass Mrs. Stewart when she was in an automobile?

A. Not to my knowledge.

[fol. 472] Q. I see. You were in the vicinity down there at Coulterville and Salem?

A. Never been at Coulterville in my life.

Q. Around Salem?

A. I have been in Salem because my business takes me through that territory.

Q. When did you see Mr. Stewart in his lifetime?
A. As Mr. Haun told you, it was along in November.

Q. I am not asking about Mr. Haun. Let's forget about Mr. Haun for a moment. Tell me now, out of your own independent recollection, when you ever saw John Stewart in his lifetime?

A. It was along back in November.

Q. What year? A. 1933.Q. 1933? A. That is right.

Q. You say you took a statement from him then?

A. No, Mr. Haun went out to see him about a statement.

Q. But Mr. Haun was working with you then, too?

A. No, he was not working with me then. Mr. Haun and I was roommates, and in his spare time, lots of times he would ride out with me while I would go to see an agent, and if he was not busy he would come along, and if I was not busy he would say, "Come on over, Renow, I got to see a man", or "get a statement".

Q. At that time, Mr. Renow, Mr. Haun took this state-[fol. 473] ment from John Stewart? A. Yes.

Q. Where is the statement?

A. How would I know. I did not have anything to do with the statement. Mr. Haun got the statement. I think it could be produced, however.

Q. Are you sure you were there when Mr. Haun got his

-statement?

A. That is right. I do not know what he did.

Q. Are you sure you ever saw John Stewart in your-

life? A. Yes, sir.

Q. You represented to Mrs. Stewart when you went around that you were a friend to Mr. Stewart, weren't you?

A. I had quite a friendly discussion with him about

politics. He was a pretty red-hot Democrat.

Q. And you represented to her that you were friendly

to him?

A. I did not exactly tell her I was intimate friends with him. I told her I met him, knew him, I got a big kick out of him because he was so red-hot Democrat.

Q. You know, as a matter of fact, do you not, that you went around to see this good woman and members of her

family at the instance of Mr. Haun?

A. No, not the first time.

Q. To get on friendly terms with them, to see if you could not help him to settle with them on his terms?

A. No, no.

Mr. Hay: That is all.

[fol. 474] Mr. Davis: That is all.

(Witness excused.)

Mr. Davis: Mr. Haun, will you come around, please?

The Court: How many times has this man been on the stand?

Mr. Davis: Yes.

The Court: How many times has he been on the stand?

Mr. Davis: Well, they put him on two or three times, Your Honor.

The Court: How many times have you had him on?

Mr. Davis: I think this is the second time.

The Court: Get through with him this time.

Mr. Davis: I will just ask him one question.

H. B. Haun, a witness of lawful age, having been here-tofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further, on behalf of the defendant, in sur-rebuttal, as follows:

Direct Examination.

By Mr. Davis:

Q. Mr. Haun, you took Mrs. Stewart out to the automobile to talk to her on this occasion at Coulterville?

A. Yes, sir.

Q. Why did you take her out there? [fol. 475] A. So I could have some privacy with the woman, would not have too many interruptions, and probably get something done in connection with this claim.

Mr. Davis: I think that is all.

Q. Had you been interrupted theretofore?

A. Every time I was in her home, there was many interruptions, people running in from across the street, talking to this, that and the other one on the telephone. I wanted privacy and got it.

Mr. Davis: I see. That is all.

Cross-Examination.

By Mr. Hay:

Q. In other words, you did not want any interruption while you worked on her, did you?

A. I had no intention of working on the woman.

Q. Well, you finally say it worked all right, didn't you? A. It sure did.

Mr. Hay: That is all.

Mr. Davis: That is all.

(Witness excused.)

The Court: Do both sides rest?

And thereupon the plaintiff, to further sustain the issues in her behalf, offered the following evidence, in re-surrebuttal:

[fol. 476] Mr. Hay: Mrs. Stewart, will you come around?

Mrs. Mary Stewart, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand, testified further on behalf of the plaintiff, in re-surrebuttal, as follows:

Direct Examination.

By Mr. Hay:

Q. Mrs. Stewart, it was testified here by witnesses for the Southern Railroad Company, I think Mr. Haun stated it, and possibly Mr. Wiechert, that you said something to the effect that you wanted to get rid of Mr. Noell. Tell the jury whether you ever made such a statement or not?

A. Why should I make such a statement as that when I appointed him to take the case, and Mr. Haun knew that I had appointed him because I told him. He said to me, "When you get a lawyer be sure that you get a good one". So then I told him that I had Mr. Noell, and I asked him if he did not think he was a smart man. He said, "Well, yes, he is one of our smartest men".

Q. And when this ining was finally settled up, did you at any time make the statement that you wanted to get rid.

of Mr. Noelli

A. I certainly never, and I never said—
[fol. 477] Q. Now, after the settlement had been made under the circumstances that you have detailed here, and you had finally gone through with it, after these talks that you had had with Mr. Hamm and Mr. Wiechert, and all that, that you related, did Mr. Noell call you up, or did you call him up after that?

Mr. Davis: That is immaterial as to what she did, Your Honor, please.

Mr. Hay. I think, showing her attitude toward Mr. Noell, in the light of what has been stated here.

The Court: Overruled.

You may answer.

To which ruling of the €ourt, the defendant, by its counsel, then and there, at the time, duly excepted.

A. Well, I felt they were working on me through my son-in-law, and I called my son up and I told him what had happened.

Mr. Sheppard: We move to strike that entire answer out, Your Honor, as not responsive to the question.

The Court: Sustained.

Q. Is that in connection with the calling of Mr. Noell?
A. Yes, sir. And I told him to call Mr. Noell, or bring him over, I wanted to talk to him.

Q. That was after you had gone through with this

thing? A. Yes, sir.

[fol. 478] Mr. Sheppard: Pardon me. Let me move to strike the answer out now for the reason that it is wholly self-serving and hearsay.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. Was there anything said about your wanting a pass,

in order to get away from Mr. Noell?

A. No. I never said anything of the kind. My daughter joked him a little while, and he said he would get a pass if I took over any place I wanted to go, but I never asked him for no pass. I had no cause to ask for a pass because I could go in a car if I wanted to.

Mr. Hay: That is all.

Mr. Davis: That is all, may it please the Court.

Which Was All the Evidence Offered in the Case.

At this point, the defendant, by its counsel, filed with the Court, in writing, its motion for a directed verdict, in words and figures as follows, to-wit: (Marked "No. T")

(Motion of Defendant to Direct Jury to Return Verdict in Its Favor.)

(Omitting formal caption)

- "At the close of the entire evidence and case, the defendant herein, Southern Railway Company, moves the Court to direct the jury to find a verdict in favor of de-[fol. 479] fendant and against plaintiff, for the reasons following:
- 1. That under the applicable rules of law, there was and is no substantial evidence adduced in this case showing or tending to show that defendant herein was or is guilty of any actionable negligence or want of duty whatever as charged in the petition.
- 2. That under the applicable rules of law, there was and is no substantial evidence adduced in this case that any actionable negligence or want of duty whatever of defendant was and is the direct and proximate cause of the fatal injuries received by plaintiff's intestate as charged in the petition.
- 3. That under the applicable rules of law, there was and is no substantial evidence whatever in this case showing or tending to show any violation of any duty as charged in the petition.
- That under the applicable rules of law, plaintiff cannot recover in this case, because the substantial evidence herein unequivocally shows that plaintiff filed in the Probate Court of St. Clair County, Illinois, a petition, duly signed and verified by her, praying that, as administratrix of the Estate of John R. Stewart, deceased, the said Probate Court order that, as such Administratrix, she be al-[fol. 480] lowed, for the sum of Five Thousand Dollars, in full settlement of all claims and demands on account of fatal injuries to John R. Stewart, deceased, to accept said sum of money, and to execute and deliver to said defendant a release in writing, fully releasing, settling and satisfying all claims demands and rights of every kind, nature and description which she, as such administratrix of said estate, had on account of the fatal injuries to said deceased; that said petition was presented to said Probate Court and said Probate Court entered an order approving said settle-

ment for Five Thousand Dollars and authorized her. such administratrix, to settle said claim with defendant and to execute and deliver to said defendant a full and complete release upon the payment of said sum of money; that in consideration of the execution of a full and complete release by her, as such administratrix, the defendant herein paid her the sum of Five Thousand Dollars, as such administratrix, and, as such administratrix, she executed and delivered to defendant a release, thus, releasing and discharging defendant from all claims, demands, actions, and rights of action that she then had or might thereafter have, as such administratrix, against defendant by reason of the fatal injuries to John R. Stewart, deceased, and specifically. [fol. 481] accepted the sum of Five Thousand Dollars in full settlement of this cause of action and appropriated the said sum of money to her own use as such administratrix; that thereafter she filed a petition in said Probate Court of St. Clair County, Illinois, and moved said Court to set aside the settlement of said claim and cause herein, which said petition, to set aside the settlement and approval of settlement for fatal injuries to her decedent, the said Probate Court of St. Clair County, Illinois, denied. On these facts, the defendant moves the Court to direct the jury to find a verdict in its favor, because, as the authority of plaintiff to settle as such administratrix or the settlement thereunder had not been revoked or set aside by the Probate Court, or some other court of competent jurisdiction in Illinois, if any, this cause of action is a collateral attack on the orders and judgments of said Probate Court of St. Clair County, Illinois; of all of which aforesaid matters only the Probate Court of St. Clair County, Illinois, had full jurisdiction.

- 5. That under the applicable rules of law, there was and is no substantial evidence in this case showing or tending to show that defendant, its agents or servants was or is guilty [fol. 482] of any actionable fraud whatever.
- 6. That under the applicable rules of law, there was and is no substantial evidence in this case showing or tending to show that defendant was or is guilty of any actionable duress whatever.
- 7. That under the applicable rules of law, there was and now is no substantial evidence in this case impeaching or

tending to impeach the execution by the plaintiff of the release offered in evidence in this case.

8. That under the applicable rules of law, there was and now is no substantial evidence in this case showing or tending to show that there was any fraud or duress whatever in the matter of the execution of the release offered in evidence, nor is there any substantial evidence showing or tending to show that the plaintiff, at the time she executed the release in question did not know that she was executing a full release, discharging the defendant from all claims, demands, actions or rights of action that she then had or might thereafter have as such administratrix against the defendant by reason of the fatal injuries to her intestate.

Wherefore defendant respectfully asks that the Court [fol. 483] may hold as above specifically prayed and direct the jury to return a verdict in favor of defendant.

SOUTHERN RAILWAY
COMPANY,
By Wilder Lucas,
Arnot L. Sheppard,
Walter N. Davis,
Its attorneys of Record."

Which said motion was by the Court marked "Refused".

And to which action of the Court in refusing the said motion, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "A")

(Instructions to Jury Requested by Defendant.)

"If you decide that plaintiff is entitled to a verdict, then the Court charges you that you should also consider that you are giving her a verdict in a lump sum that would otherwise have come to her decedent in installments over a long period of time, and, of course, that would make whatever lump sum you decide to give, if you decide plaintiff is entitled to a verdict, necessarily much less than the aggregate of the amount he would be paid each pay if working."

[fol. 484] Which said requested charge marked "A" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "B")

"The plaintiff is an interested witness. You should scrutinize the testimony of an interested witness with special care to ascertain whether or not his or her interest has caused him or her to testify falsely or color his or her testimony."

Which said requested charge marked "B" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "C")

"The Court charges the jury that if you find that plain[fol. 485] tiff's decedent was injured by some act of his own
not connected with a coupler, then the coupler would not
be the proximate cause of his injury and plaintiff cannot
recover. By proximate cause is meant that, which in a
natural and a continuous sequence, unbroken by any intervening cause, which produces an event and without which
an event would not have occurred. A proximate cause is
that which is nearest in the order of responsible causations."

Which said requested charge marked "C" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "D")

"The Court charges the jury that in determining what weight you will give to the testimony of a witness, you should take into consideration his or her interest, if any, in the outcome of the litigation, and any other facts or circumstances which you consider affect his or her credibility."

[fol. 486] Which said requested charge marked "D" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there, at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "E")

"The Court charges the jury in this case that it is not disputed that the cars or cars in question were equipped with couplers that would couple automatically by impact."

Which said requested charge marked "E" was by the Court marked "Refused."

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there, at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "F")

"The Court charges the jury, at the close of the entire [fol. 487] evidence and case, that under the law, the "pleadings and the evidence in this case, the plaintiff is not entitled to recover and your verdict must be for defendant."

Which said requested charge marked "F" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "G")

"The Court charges the jury, at the close of plaintiff's case, that under the law, the pleadings and the evidence in this case, the plaintiff is not entitled to recover and your verdict must be for defendant."

Which said requested charge marked "G" was by the Court marked "Refused"

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: [fol. 488] (Marked "H")

"The Court charges you that by the expression, 'Greater weight or preponderance of the evidence,' the Court means that evidence which has the greater weight with respect to its credibility."

Which said requested charge marked "H" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "I")

"The Court instructs the jury that if you believe from the evidence in this case that the plaintiff, Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, understood that she was signing a release, fully releasing and discharging the Southern Railway Company of any and all liability, by reason of the death of John R. Stewart, or, if you believe from the evidence that if the plaintiff did not so understand and that later by her actions confirmed and ratified the execution of the release in question by petition-[fol. 489] ing the Probate Court of the County of St. Clair and State of Illinois for an order approving and confirming the release executed by her, then, in either event, the release is a bar to the plaintiff's action, and it is your duty to find the issues for the defendant, Southern Railway Company."

Which said requested charge marked "I" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "J")

"The jury is instructed that if you believe from the evidence that at the time of the execution of the release offered in evidence, the plaintiff, Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, was mentally capable of understanding what she was doing, and if you further believe from the evidence that she understood that she had signed a release, releasing the Southern Railway Company of all liability for the death of the deceased, John R. Stewart, or if you believe that by the exercise of her ordinary [fol. 490] faculties she could have ascertained such fact, then it is your duty to find the issues for the defendant, Southern Railway Company."

Which said requested charge marked "J" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "K")

disregard the release in evidence because of any conduct, if any there be, on the part of the defendant, or its agents, which relates solely to the consideration for which such release was given. You are further instructed that if Mary Stewart, Administratrix of the estate of John. R. Stewart, deceased, signed the release in question with knowledge that she was releasing all claims for liability for the death of the said John R. Stewart, and there was no fraud or duress in the actual execution of the release, then, and in that case, the release is valid and binding upon the plaintiff, Mary Stewart, Administratrix of the estate of John R. Stewart, and you should find the issues in favor [fol. 491] of the defendant, Southern Railway Company."

Which said requested charge marked "K" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, fited with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "L")

"The Court charges the jury that if the jury believe from the evidence that the said Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, ratified and confirmed her action in executing the release in evidence by filing her sworn petition in the Probate Court of the County of St. Clair and State of Illinois, requesting said Probate Court to enter an order approving said release executed by the said Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, then it is your

duty to find the issues in favor of the defendant, Southern Railway Company."

Which said requested charge marked "L" was by the Court marked "Refused".

[fol. 492] And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "M")

"The Court charges you gentlemen of the jury that if you believe from the evidence that Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, signed the release in question and received from the defendant, Southern Railway Company, or its agents, the sum of money therein mentioned, namely \$5000, then your verdict should be for the defendant, Southern Railway Company, unless you further believe from a preponderance of the evidence that the plaintiff at the time she signed said release, and at the time she petitioned the Probate Court of the County of St. Clair and State of Illinois for an order confirming and approving said release, she did not know or understand or could not, by the exercise of ordinary care, know that she was signing a full and complete release to the defendant in the premises."

Which said requested charge marked "M" was by the Court marked "Refused".

[fol. 493] And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to wit: (Marked "N")

"The Court charges the jury that if you find and believe from the evidence that plaintiff, Mary Stewart, was duly appointed Administratrix of the estate of John R. Stewart, deceased, by the Probate Court of St. Clair County, Illi-

nois, on or about April 16, 1937, and that thereafter she filed in said Probate Court, a petition duly signed and verified by her, in and by which petition plaintiff represented that defendant had offered and agreed, provided a full release could be obtained, to pay her, as Administratrix of the estate of John R. Stewart, deceased, the sum of Five Thousand Dollars in full settlement of all claims and demands on account of the fatal injuries to said deceased; and that she prayed in said petition that an order be entered in said Probate Court approving said settlement and authorizing and directing plaintiff, as such administratrix to make such settlement, and, upon payment to her of Five Thousand Dollars, to execute and deliver [fol. 494] to defendant herein a release in writing, fully releasing, settling, satisfying and determining all claims, demands, and rights of action of every kind, nature and description which she, as such administratrix of said estate, had on account of the fatal injuries to said deceased; and that on or about November 30, 1937, the said petition was presented to said Probate Court and that an order was entered in and by said Probate Court in and by which said settlement was approved and plaintiff was authorized, as such administratrix, upon receipt of the sum of Five Thousand Dollars, to settle said claim and to execute and deliver to defendant a full and complete release, settling, satisfying and discharging all claims, demands, actions and causes of action of every kind, nature and description which she, as such administratrix, had against defendant on account of the fatal injuries to John R. Stewart, deceased; and if you further find and believe from the evidence that on or about November 30, 1937, the plaintiff, as Administratrix of the Estate of John R. Stewart was paid the sum of Five Thousand Dollars by defendant, and that she, as such administratrix executed a release to defendant, releasing and discharging it from all claims, demands, actions and rights of action that she then had or might thereafter have against defendant [fol. 495] herein by reason of the fatal injuries to John'R. Stewart, deceased; and if you further find and believe from the evidence in this case that defendant herein gave plaintiff, as such Administratrix a check or draft in consideration of said release and that plaintiff, as such administratrix cashed said check or draft; and that, on or about December 10, 1937, plaintiff as such Administratrix filed in the Probate Court of St. Clair County, Illinois a petition to set aside the settlement of her claim as such Administratrix against defendant herein and that on or about January 31, 1938, in the Probate Court of St. Clair County, Illinois, the petition of Mary Stewart, as Administratrix of the Estate of John R. Stewart, deceased, to set aside the settlement for fatal injuries to her decedent, by the Probate Court of St. Clair County, Illinois, was denied, then your verdict must be for defendant, Southern Railway Company."

Which said requested charge marked "N" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and [fol. 496] asked the Court to charge the jury as follows, towit: (Marked "O")

"The Court charges the jury that you have no right to disregard the release in evidence on the ground of any inadequacy or insufficiency of the consideration named herein."

Which said requested charge marked "O" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "P")

"The Court charges the jury that if you find and believe from the evidence in this case, that Hamm, plaintiff's son-in-law, procured a railroad pass for his mother-inlaw, and that witness Barrett told some one in the Hamm family that if he was Hamm he would watch himself, and that such statement was told to plaintiff and that plaintiff was actuated in making the settlement by what Barrett said, and not by any other motive or statement, then plaintiff cannot recover and your verdict must be for defend[fol. 497] ant."

Which said requested charge marked "P" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "Q")

"The Court charges the jury that if you find and believe from the evidence in this case that on or about November 30, 1937, the day of the settlement, neither witness Haun nor Wiechert said to plaintiff, or her daughter, Mrs. Hamm, or her son-in-law, Hamm, that Hamm could lose his job, and it had been done, if he did not obey orders and that he could be fired if he did not bring plaintiff to the office, then plaintiff cannot recover and your verdict must be for defendant."

Which said requested charge marked "Q" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then [fol. 498] and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "R")

"You are instructed that the term 'duress' means actual or threatened violence or restraint of one's person contrary to law, to compel a person to enter into a contract or to discharge one. Therefore you are instructed that duress will not prevail to invalidate a contract entered into with full knowledge of all the facts, with ample time and opportunity for investigation, consideration, consultation, reflection and no restraint, actual or threatened of his freedom of action.

You are further instructed that if you find and believe from the evidence herein that at the time plaintiff executed the release mentioned in evidence she understood what she was doing and had full power to execute or refuse to execute the release, insofar as actual or threatened restraint of her freedom of action was concerned; And if you further find and believe from the evidence, that before executing such release she consulted with other members of her family and was under no straint of any kind imposed [fol. 499] or threatened by the defendant, then you cannot find that she executed said release while under duress imposed by defendant.

You are further instructed that even though you find from the evidence herein that defendant's agents, servants and employees vexed and annoyed plaintiff in their efforts to persuade her to execute the release, such facts are wholly insufficient to prove that she executed the release while under duress. In this connection you are further instructed that before you can find that plaintiff executed the release in question under duress, you must find from the greater weight of the credible evidence that she was so overwhelmed by terror that she did not realize what she was doing at the time she executed said release.

You are further instructed that even though you may find from the evidence that plaintiff feared that unless she executed the release mentioned in evidence her son-in-law would lose his job with the Terminal Railroad Association of St. Louis, you cannot find that she executed said release under duress, for the reason that such fear, whether well or all-founded, is wholly insufficient in law to constitute duress because it did not threaten violence to her, or restraint of her person, or terrorize her so that her freedom [fol. 500] of physical or mental action was suspended."

Which said requested charge marked "R" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "S")

"The Court charges the jury that before you can find for plaintiff in this case it is necessary for you to find from the preponderance or greater weight of the evidence that plaintiff's decedent, John R. Stewart, was acting within the scope of his employment in going between the cars and that it was necessary for him in the discharge of his duties to go between the cars to couple or uncouple them."

Which said requested charge marked "S" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, the defendant, by its counsel, filed with [fol. 501] the Court, in writing, a requested charge to the jury, and asked the Court to charge the jury as follows, to-wit: (Marked "U")

"The Court charges the jury that even though you may find and believe from the evidence in this case that one Hamm, plaintiff's son-in-law, was employed by the Terminal Railroad Association of St. Louis, and that he was called to the Legal Department of the Terminal Railroad by Joseph L. Howell, its attorney, on or about November 23, 1937, and that said Howell told said Hamm that defendant was offering to pay plaintiff Five Thousand Dollars clear, and that she was willing to take it, but that he (Hamm) was standing in the way, and that Hamm told Howell that he was because he did not want that woman gypped out of what money she gets, and that Howell then said to him, 'How about the Five Thousand Dollars,' and Hamm said 'That is all right to settle for that, if she gets the Five Thousand Dollars, but that he wanted it in writing, and that Howell advised said Hamm that if Bruce A. Campbell would say that plaintiff would get Five Thousand Dollars net and that plaintiff would be guaranteed by said Campbell that he would save her harmless on account of any attorney fees to her said attorney on account of this suit for the fatal injuries to John B. Stewart, deceased, and that he (Howell) would guarantee whatever [what[fol. 502] ever] said Campbell said, yet, if you further find from the evidence in this case that the said Howell did not intimidate, coerce or threaten to cause the said Hamm to be discharged unless plaintiff would settle her cause of action, as administratrix of John R. Stewart, deceased, with defendant, and that the said Howell did not bring pressure or undue influence to bear on Hamm and did not threaten to have Hamm, plaintiff's son-in-law, discharged from his job with the Terminal Railroad Association of St. Louis, unless plaintiff settled this case, then you must not consider the act of Howell in calling Hamm, plaintiff's son-in-law to the Legal Department of said Terminal Railroad Association of St. Louis as evidence of fraud or duress."

Which said requested charge marked "U" was by the Court marked "Refused".

And to which action of the Court in refusing to give the said charge to the jury, the defendant, by its counsel, then and there at the time duly excepted.

[fol. 503] At this point, 4:52 P. M., Monday, June 12, 1939, an adjournment was had until Tuesday, June 13, 1939, at 10:00 oelock A. M.

Pursuant to the said adjournment, the Court convened at 10:00 o'clock A. M., Tuesday, June 13, 1939, and the following proceedings were had:

And thereupon counsel made their closing arguments to the Court and the jury.

And thereupon the Court charged the jury as follows:

[fol. 504] The Court's Charge to the Jury.

The Court: It now becomes the duty of the Court to give you a charge of law that governs you in your deliberations in arriving at a verdict in this case.

I am going to do it at this time because we have a heavy docket here, and after you are given the charge of law in this case and are ready to retire, to deliberate upon your verdict, my purpose is to let you go to your jury room and proceed immediately with your deliberation, or, if you

choose, you may, at your own pleasure, go out and get your lunch, and then return to the jury room.

Under your oaths of office you are bound by the law as declared to you by the Court. If I should err in declaring that law, the blame rests upon me and not upon you.

It has been and will be the Court's purpose in this case to express no opinion on the facts, for that is your province, and the Court does not propose, even if it had the power to do so, to influence your judgment on the facts to even the slightest degree.

If it should seem to you at any time this Court has an opinion respecting what may or may not be the facts in the case, you should also remember that opinion is in no way binding upon you.

[fol. 505] The Court's conclusion should not and need not in any way control you in your finding upon the facts in this case.

You are instructed that you are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony.

You are warranted in considering the manner and appearance of the witness on the stand, his or her manner of testifying, the probability or improbability of the testimony which he or she gives; his or her situation to see and to observe, and his or her apparent candor or capacity to truthfully and accurately relate what he or she saw and observed.

You are also warranted in considering the relation and/or the feeling of any witness who has been offered before you, for the plaintiff, upon the one hand, and the defendant, upon the other.

You are instructed, if you find and believe from the evidence that any witness in the case has testified falsely on any material matter, you are at liberty to reject any part or all of the testimony of any such witness.

You will observe that there has been some testimony in this case which may be properly designated as expert testi-[fol. 506] mony, that is to say, testimony of persons skilled in some art, trade or science, who have knowledge in relation to matters which are not known to men of common education and experience.

You are instructed that such opinion evidence as has been given in this case is competent evidence for your consideration, and in your deliberations you are entitled to give to such evidence such weight and value as you may think it entitled, measured by the same standard as you would weigh the evidence of any other competent witness in the case.

The Court charges you that the only question for you to consider, so far as the release offered in evidence is concerned, is whether or not its execution was procured by fraud or duress. You are not, under the law, entitled to consider whether or not the amount paid was adequate for the death of the deceased, John R. Stewart.

If you believe from the evidence that there was no fraud or duress in the execution of the release, and the settlement was consummated in good faith by the Southern Railway Company, then it is your duty to find the issues in favor of defendant, Southern Railway Company.

The Court charges the jury, in determining whether the [fol. 507] release in evidence was procured by fraud or duress, you must not consider any representations, if any, made by defendant's attorneys or claim agents, that she had no valid cause of action against defendant, and that she could recover nothing against the defendant on account of the fatal injury to John R. Stewart, deceased.

If you find and believe from the evidence that defendant, through its agents and servants, in the effort to induce plaintiff to make the settlement mentioned in the evidence, committed acts and used language for the purpose of leading plaintiff to believe that unless she made the settlement her son-in-law would lose his employment with the Terminal Railroad Association, and that plaintiff did so believe, and because thereof, if you so find, was put in such a state of fear as to be unable to act of her own free will, and that while under such fear and while unable to act of her own free will, if you so find, she agreed to the settlement, and did the things mentioned in the evidence in connection

therewith; and if you further find and believe from the evidence that plaintiff would not otherwise have made the settlement; and if you further find that after the settlement was made plaintiff promptly rescinded the contract of release, and tendered to defendant the amount paid under [fol. 508] such settlement, then, you are instructed that the contract of release and settlement was not binding upon this plaintiff and should be disregarded by you.

The Court instructs the jury that, the Federal Safety Appliance Act requires that the car mentioned in the evidence be equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars, and the Employers Liability Act provides that no employee who may be injured shall be held guilty of contributory negligence in any case where the violation of such common carrier of any statute macted for the safety of employees contributed to the injury of such employee; and the Court further instructs you that the Federal Safety Appliance Act is a statute enacted for the safety of employees, and the Court further instructs you that under the said Act it is unlawful for any common carrier or railroad to haul or permit to be hauled or used on its line of railroad any car used in moving interstate traffic that is not equipped with couplers coupling automatically; therefore, if you find and believe from the evidence that the deceased attempted to open the knuckle of the coupler mentiond in the evidence by means of the pin lifter extending on the outside of the car, and if you find the pin lifter was [fol. 509] used by deceased, and would not open the knuckle; and if you find that on the 12th day of February, 1937, the deceased thereupon went between the ends of the cars and was injured when attempting to open and adjust the coupler; and if you find that the failure of the coupler to operate automatically was the proximate cause of deceased's injury and death; then your verdict should be for the plaintiff, provided that you further find that the defendant was at the time of the injury to deceased engaged in interstate commerce and doing business in this Judicial District, and that deceased was engaged at the time of his injury in interstate commerce transportation of commerce with defendant.

You are instructed that it was the duty of the deceased, in the performance of his work, before going between the cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, extending on the outside of the car, and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars, if you find he did go between the ends of the cars.

The Court charges the jury that before plaintiff may recover in this case, she must prove by the preponderance or the greater weight of the evidence that the injury to [fol. 510] and death of plaintiff's decedent were caused by the cars in question not being equipped with couplers coupling automatically by impact.

The Court charges the jury that the mere fact that the plaintiff's decedent may have sustained an injury and died therefrom, if you so find, is not sufficient in warranting you in returning a verdict against defendant in this case.

You cannot presume that the couplers would not couple by impact, but on the contrary the law places on plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the credible evidence.

This burden abides with plaintiff throughout the case, and if you, find that plaintiff has not proved the above facts to your reasonable satisfaction by the preponderance or greater weight of the evidence, or if you find the evidence on the subject to be evenly balanced, then in either state of events, plaintiff is not entitled to recover against defendant, and your verdict must be for the defendant.

The Court charges the jury, if you find that decedent was injured by some act of his own not connected with the [fol. 511] coupler, then the coupler would not be the proximate cause of his injury, and plaintiff cannot recover.

By proximate cause is meant the efficient producing cause of such injury, and of which such injury was the natural and probable consequence, and without which such injury would not have occurred. The Court charges the jury that you cannot presume that the couplers on the cars in question would not couple automatically by impact, but on the contrary the law places upon the plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the evidence.

Unless plaintiff has proven such facts to your reasonable satisfaction as above stated, then plaintiff is not entitled to recover in this case, and your verdict must be for defendant.

The Court charges the jury that you cannot presume that plaintiff's decedent, John R. Stewart went between the cars in question to make a coupling or adjust the coupling, nor can you presume from the mere fact that his arm was injured between couplers that he went between the cars in question to make a connection; therefore, unless plaintiff has proved to your reasonable satisfaction by the preponderance or greater weight of the evi[fol. 512] dence that John R. Stewart, deceased, went between the cars to make a coupling or adjust the coupler, then the fact that he was injured by having his arm caught between the couplers was not the proximate cause of his injury and death, and plaintiff cannot recover, and your verdict must be for defendant.

While the burden with regard to making out a case of greater weight or preponderance of the evidence rests upon the plaintiff, you are instructed that the terms, "greater weight of the evidence", and "preponderance of the evidence", do not necessarily mean the greater number of witnesses.

The preponderance is determined from a consideration of all the credible evidence.

You are therefore instructed that if the credible evidence in the case preponderates in favor of the plaintiff, then the plaintiff has satisfied the requirements of the law which casts the burden of proof upon her.

The Court charges the jury in this case that the burden of proof rests upon the plaintiff to prove by the preponderance, that is, the greater weight of the credible evidence, the fact necessary to entitle her to recover, and the burden [fol. 513] of proof does not shift from side to side, but constantly remains with the plaintiff; therefore, if you find the evidence to be evenly balanced in this case, or if you find plaintiff has not proved by the preponderance, that is, the greater weight of the evidence, facts necessary to entitle her to recover, then your verdict must be for the defendant.

The Court charges the jury, unless you find from the preponderance or greater weight of the evidence in this case, that the proximate cause of injury and death of decedent was caused by a coupler or couplers that would not couple automatically by impact, then your verdict must be for the defendant.

The Court charges the jury that no liability on the part of the defendant arises from the mere happening of an accident. The mere fact that an accident happened is not proof that the coupler would not couple automatically by impact.

There is no presumption in this case that the coupler would not couple automatically by impact.

The burden of proof predominates upon plaintiff, from the beginning to the end, to prove by the preponderance of the evidence the couplers would not couple automatically by impact, and, as a proximate result thereof, plaintiff's decedent was injured and died.

[fol. 514] The Court instructs the jury you are not permitted to try the case on a conjectural theory of liability, in order to hold defendant liable in damages in this case, but that you are to decide the case in accordance with the evidence and the law as declared to you by the Court.

The Court charges you in this connection that you should not suffer a sympathy for the plaintiff, because you may believe that plaintiff's decedent suffered an injury and died, to enter or play a part in your decision, nor should you permit the fact that defendant is a railroad corporation to influence you in arriving at your verdict,

You may then consider whether any witness has sworn falsely to any material fact in this case.

If you find he has, then you are warranted in rejecting the whole or any part of such witness' testimony. The Court instructs the jury if you find for the plaintiff under the other instructions given you, you will assess her damages in such sum as you may find and believe from the evidence is the present cash value of the future pecuniary benefits, if any, of which the widow is deprived by the death of John R. Stewart, making adequate allowance for the spending power of money.

[fol. 515] You are further instructed that, in addition to the pecuniary loss or damage, if any, sustained by the widow, you may award plaintiff damages for the conscious pain and suffering, if any, endured by John R. Stewart in the interval between his injury and death.

You are further instructed that your award to plaintiff, if any, may not exceed the sum of \$65,000, the amount claimed by plaintiff, less the sum of \$5,000, the amount heretofore received by her.

The Court has caused to be prepared for you two blank forms of verdict.

If your finding shall be for the plaintiff, you will use the first of these forms, which I exhibit to you now, and fill in the blank space the amount of damages you find plaintiff is entitled to; and if your verdict should be for the defendant, you will use the second form, which I now exhibit to you.

In either event, when you have arrived at a verdict, remember in this court your verdict must be unanimous. It must be concurred in by all twelve of you.

You will have some member, it matters not which, sign it as foreman and return it into court.

Has the plaintiff any further suggestions or exceptions?

Mr. Noell: The charge is entirely satisfactory to the [fol. 516] plaintiff.

The Court: Has the defendant any further suggestions or exceptions?

Mr. Sheppard: Yes, Your Honor, the defendant has.

The Court: Well, step up here.

Mr. Sheppard: (To the Court out of the hearing of the jury.)

Defendant objects and excepts to the failure of the Court's charge anywhere to require the jury finding that the coupler involved in this controversy was defective and insufficient, or defective or insufficient or out of order or inefficient; for the further reason that the Court's charge wholly fails to define duress, and that the charge with respect to duress, and in which is contained the hypothesis upon which the jury is told it may find duress, does not contain the facts necessary to constitute duress under the law, but permits the jury to base its finding upon the foundation of duress, without the finding of any of the necessary facts which under the law constitute duress.

Defendant objects and excepts to that portion of the charge which tells the jury that in the absence of any testimony—

The Court: Have you any definition of duress?

[fol. 517] Mr. Sheppard: Yes, sir. I submitted it to Your Honor.

The Court: What is it?

Mr. Sheppard: I will come to that in a few minutes.

(Continuing)—that decedent did not make an attempt to lift the pin lifter, the law presumes that he did make such attempt before going between the cars; for the reason that that was an incorrect statement of the law; for two reasons: First, because it puts the burden of proof on the defendant initially to show that no effort was made; and, second, because it is a legal presumption which is wholly unwarranted by the law, and that such portion of the Court's charge conflicts with the other portions of the charge in which the jury is told that the burden of proof of the facts necessary to warrant a recovery by plaintiff rests upon plaintiff throughout the trial; that the fact that the coupler would not work is presumed, and it is in conflict with that portion of the Court's charge.

Defendant further objects and excepts to the failure and refusal of the Court to charge the jury with respect to the facts necessary to constitute duress in the manner re-

quested by defendant in its instruction, which was submitted to the Court and which the Court refused to give, [fol. 518] and which has been marked for convenience Instruction No. R, and contains the notation "Refused, Moore, J", at the end of it.

Mr. Davis: Can't we offer all these instructions refused, just this way, as we did before?

Mr. Sheppard: I do not know whether we can or not. I am afraid of it. I am afraid we have got to take them separately and individually, and cannot take a shotgun shot at it.

The Court: No, you can't do that.

Mr. Sheppard: Defendant further objects and excepts to the Court's charge with respect to the hypothesis announced to the jury upon which they may find that plaintiff acted under duress, for the reason that the sole hypothesis therein is the fact that Hamm was threatened with the loss of his job, and that plaintiff relied upon and believed that threat, and was caused to sign the release thereby; for the reason that such facts are wholly insufficient to constitute any duress or fraud of any kind or character, and each and every portion of the Court's charge hypothesizing a verdict for plaintiff based upon any fraud or any duress is wholly unsupported by any evidence in the case.

Defendant further objects and excepts to the Court's [fol. 519] refusal to give to the jury the instruction requested by it, which is for convenience marked with the letter "S", and which appears to have been refused by the word "Refused, Moore, J", in which the jury would have been charged that it was necessary to find from the preponderance or greater weight of the evidence that decedent was acting within the scope of his employment in going between the cars, and that it was necessary for him to do so in the discharge of his duties, for the reason that that portion or construction properly declares the law, and there is no other portion of the Court's charge on that subject.

Defendant objects and excepts to its requested instruction which has for convenience been marked "N", which submitted to the jury the question of the efficacy of the Probate proceedings in the State of Illinois, and which portion of the charge the Court refused to give, for the reason that such Probate proceedings cannot be collaterally attacked in this case, and until they are set aside they constitute a bar to the further progress of this action, and the Court erred in refusing so to instruct or charge the jury.

Defendant further objects and excepts to that portion of the charge—to the Court's refusal to give the instruc[fol. 520] tion marked for convenience "U", requested by defendant in this case, which submits to the jury the theory of the conversation between Mr. Howell and Mr. Hamm which appears in evidence here as wholly insufficient upon which to base a charge of fraud or duress, and that such hypothesis is not submitted by any other portion of the Court's charge.

Defendant further objects and excepts to the Court's refusal to give that portion of the charge submitted by defendant and designated by "M", which properly hypothesizes the facts with respect to duress, and they are not hypothesized in any other portion of the Court's charge.

Defendant further objects and excepts to the charge of the Court in that it refused to give to the jury that portion of the charge requested by defendant and identified or marked by the letter "L", which submits to the jury the question of whether or not plaintiff in this case, by her acts subsequent to the execution of the release has ratified the Probate proceedings and all proceedings leading up to the execution of the release.

Defendant further objects and excepts to the refusal of the Court to include in its charge the matter designated by the letter "K", and requested by defendant to be included [fol. 521] in the charge, to the effect that under the facts as developed by the testimony here, there is no fraud or duress shown in the actual execution of the release, and defendant was entitled to have the jury charged that unless there was fraud or duress shown in the actual execution of the release, the release was and is binding upon plaintiff in this case.

Defendant objects and excepts to the failure and refusal of the Court to include in its charge that matter submitted

by defendant in writing to the Court and marked with the letter "J", which would have informed the jury that if it found from the evidence that plaintiff was mentally capable of understanding what she was doing, and by the exercise of her ordinary faculties she could have ascertained such facts when she executed the release, then the release is binding upon plaintiff for the reason that such portion of the charge would have properly declared the law as applicable to the facts in this case.

Defendant further objects and excepts to the Court's charge in that it failed to include the matter submitted by defendant, which for convenience has been marked instruction numbered "I", to the effect that if plaintiff herein knew and understood what she was doing when she signed [fol. 522] the release or later confirmed and ratified the execution of the release in question by petitioning the Probate Court for an order approving and confirming the release, then in their finding the verdict should be for defendant, for the reason that such portion of the charge would have properly declared the law applicable to the facts herein, instead of the charge which the Court did give to the jury, which improperly declares the law as applied to those facts, and with special reference to those facts.

Defendant further objects and excepts to the Court's action in refusing to give to the jury that portion of the charge requested by defendant, identified by the letter "G", which would have told the jury that under the pleadings and evidence in this case the plaintiff is not entitled to recover, and the verdict must be for defendant for the reason that under the law and the facts herein no jury question was made.

Defendant further objects and excepts to the Court's charge in that as a whole it failed to require the jury to find any fact showing the existence of any fraud or duress in any way.

Defendant further objects and excepts to that portion of the Court's charge dealing with a definition of a greater [fol. 523] weight or preponderance of the evidence, for the reason that such portion of the charge does not properly define either the greater weight of the evidence or the preponderance of the evidence, but is no more than a mere comment on the number of witnesses and the preponderance of the evidence.

Defendant further objects and excepts to that portion of the Court's charge dealing with the measure of damages, for the reason that the evidence in this record wholly fails to disclose the expectancy of either decedent or plaintiff, and wholly fails to take into consideration the Railway Retirement Act, and its effect upon the further earning power of the decedent.

Defendant further objects and excepts to the charge of the Court for the additional reason that this Court has no jurisdiction over this matter except to dismiss it for lack of jurisdiction.

Defendant further objects and excepts to the failure of the Court primarily to instruct a verdict in its favor for the reason assigned in the written instruction heretofore requested and refused by the Court.

I think that is all.

The Court: Gentlemen (addressing the jury), you may now retire and consider your verdict. As I told you, you [fol. 524] may determine for yourselves if you desire first to go to lunch and return here, say at 2:30. You may go now and determine that for yourselves.

And thereupon, at 1:35 P. M., Tuesday, June 13, 1939, the jury retired to their jury room, to consider of their verdict.

And thereafter, on the same day, to-wit, on the 13th day of June, 1939, the jury returned their verdict in words and figures as follows:

"United States of America,

Eastern Division of the Eastern Judicial District of Missouri—ss.

In the District Court of the United States in and for Said Division of Said District.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff,

No. 12154. vs.

Southern Railway Company, a corporation.

Verdict.

We, the jury in the above entitled cause, find the issues herein joined in favor of the plaintiff, Mary Stewart, Administratrix of the Estate of John B. Stewart, deceased, and against the defendant, "Southern Railway Company, [fol. 525] and assess the damages of said plaintiff against said defendant in the sum of Seventeen thousand five hundred Dollars, (\$17500.00).

(Signed) C. F. HEBBELER, Foreman,

June 13, 1939."

The foregoing transcript of evidence and proceedings has been examined and is hereby approved and agreed to by:

Attorneys for Plaintiff.

Attorneys for Defendant.

[fol. 526] Docket Entry Showing Filing of Notice of Appeal and Mailing Copies Thereof to Appellee, and to Approving Supersedeas Bond on Appeal.

September 19, 1939.

Defendant's notice of appeal to United States Circuit Court of Appeals, Eighth Circuit, from final judgment entered herein on June 13, 1939, which became final on August 24, 1939, on overruling of defendant's motion for a new trial, etc., filed in duplicate and a copy thereof forthwith mailed by the Clerk of the Court to Charles P. Noell and Charles M. Hay, Attorneys for plaintiff. Order filed and

entered fixing the amount of the supersedeas bond of defendant, on said appeal. Supersedeas bond of defendant in the sum of \$25,000.00, presented, approved and filed.

[fol. 527]

(Bond on Appeal.)

(Filed September 19, 1939.)

Know All Men By These Presents, that we, Southern Railway Company, a corporation, as principal, and American Surety Company of New York, a corporation duly authorized to sign bonds on appeal, as surety, are held and firmly bound unto Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, in the penal sum of Twenty-five Thousand Dollars (\$25,000.00), lawful money of the United States, to be paid to her and her respective executors, administrators or successors, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of September, A. D. 1939.

The Condition of the Above Obligation Is Such:

Whereas, on the 24th day of August, A. D. 1939, the above named Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, did obtain a final judgment against the above bounden, Southern Railway Company, a corporation, in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, for the sum of Seventeen Thousand Five Hundred Dollars (\$17,500), and costs of suit; and

Whereas, on the 19th day of September, A. D. 1939, the above named Southern Railway Company, a corporation, did, in accordance with Rule 73 of the Rules of Civil Procedure for the District Courts of the United States, file with the said District Court a Notice of Appeal from said final judgment to the Circuit Court of Appeals for the Eighth Circuit; and,

Whereas, in accordance with said Rule as mentioned, the said Southern Railway Company, a corporation, desires a stay on appeal, and said District Court has fixed the amount of a supersedeas bond in the penal amount here-

inabove named, and said Southern Railway Company, a corporation, desires a stay on appeal and that this bond be a supersedeas bond, as provided by Rule 73, aforesaid.

Now, Therefore, if the above named Southern Railway Company, a corporation, shall satisfy said judgment in full, together with costs, interest and damages for delagif for any reason the said appeal is dismissed, or if the said judgment is affirmed, and shall satisfy in full such modification of said final judgment and such costs, interest and damages as the said appellate court may adjudged and award, then and in that case this obligation to be null and void; otherwise to remain in full force and effect.

SOUTHERN RAILWAY COMPANY, By Bruce A. Campbell, (Seal) Its Division Counsel for the States of Illinois and Missouri.

AMERICAN SURETY COMPANY OF NEW YORK, O. L. KINCHELOE,

By O. L. Kincheloe,

(Seal)

Resident Vice President.

Attest:

E. K. Jackson, Resident Assistant Secretary.

[fol. 528] State of Illinois, 'County of St. Clair—ss.

Bruce A. Campbell, after being first duly sworn, upon his oath deposes and says that he is Division Counsel of the Southern Railway Company for the States of Illinois and Missouri; that as such Division Counsel he has authority to sign the Southern Railway Company's name to any and all appeal bonds given by the said Southern Railway Company in the States of Illinois and Missouri, and that he has such authority to sign said Southern Railway Company's name to the attached appeal bond; that he has such authority by virtue of a resolution of the Board of Directors of said Southern Railway Company.

(Seal)

BRUCE A. CAMPBELL.

Subscribed and sworn to before me this 18th day of September, A. D. 1939.

STELLA BURTON, Notary Public.

[fol. 529] Statement of Points Relied Upon on Appeal. (Filed Sept. 20, 1939)

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased, Plaintiff,
No. 12154. vs. Court Room No. 2.

Southern Railway Company, a corporation, Defendant.

Comes now the defendant in the above entitled cause and says that in the record and proceedings in this cause in the United [—] District Court manifest error has occurred to the prejudice of this defendant, to-wit:

I.

The said United States District Court erred in refusing a request of the defendant for a motion for a directed verdict, that is, an instruction or charge to the jury in the nature of a demurrer to the evidence offered by defendant at the close of plaintiff's case to find for defendant, which requested charge is as follows:

"At the close of plaintiff's evidence and case, the defendant herein, Southern Railway Company, moves the Court to direct the jury to find a verdict in favor of defendant and against plaintiff, for the reasons following:

- 1. That under the applicable rules of law, there was and is no substantial evidence adduced in this case showing or tending to show that defendant herein was or is guilty of any actionable negligence or want of duty what-[fol. 530] ever as charged in the petition.
- 2. That under the applicable rules of law, there was and is no substantial evidence adduced in this case that any actionable negligence or want of duty whatever of

defendant was and is the direct and proximate cause of the fatal injuries received by plaintiff's intestate as charged in the petition.

- 3. That under the applicable rules of law, there was and is no substantial evidence whatever in this case showing or tending to show any violation of any duty as charged in the petition.
- That under the applicable rules of law; plaintiff cannot recover in this case, because the substantial evidence herein unequivocally shows that plaintiff filed in the Probate Court of St. Clair County, Illinois, a petition, duly signed and verified by her, praying that, as administratrix of the Estate of John R. Stewart, deceased, the said Probate Court order that, as such administratrix, she be allowed, for the sum of Five Thousand Dollars, in full set tlement of all claims and demands on account of the fatal injuries to John R. Stewart, deceased, to accept said sum of money, and to execute and deliver to said defendant a release in writing, fully releasing, settling and satisfying all claims, demands and rights of every kind, nature and description which she, as such administratrix of said estate, had on account of the fatal injuries to said deceased; that said petition was presented to said Probate Court and said Probate Court entered an order approving said settlement for Five Thousand Dollars and authorized her. as such administratrix, to settle said claim with defendant and to execute and deliver to said defendant a full and [fol. 531] complete release upon the payment of said sum of money; that in consideration of the execution of a full and complete release by her, as such administratrix, the defendant herein paid her the sum of Five Thousand Dollars, as such administratrix, and, as such administratrix, she executed and delivered to defendant a release, thus, releasing and discharging defendant from all claims, demands, actions, and rights of action that she then had or might thereafter have, as such administratrix, against defendant by reason of the fatal injuries to John R. Stewart, deceased, and specifically accepted the sum of Five Thousand Dollars in full settlement of this cause of action and appropriated the said sum of money to her own use as such administratrix; that thereafter she filed a petition in said Probate Court of St. Clair County, Illinois, and



moved said Court to set aside the settlement of said claim and cause of action herein, which said petition, to set aside the settlement and approval of settlement for fatal injuries to her decedent, the said Probate Court of St. Clair County, Illinois, denied. On those facts, the defendant moves the Court to direct the jury to find a verdict in its favor, because, as the authority of plaintiff to settle as such administratrix or the settlement thereunder had not been revoked or set aside by the Probate Court, or some other court of competent jurisdiction in Illinois, if any, this cause of action is a collateral attack on the orders and judgments of said Probate Court of St. Clair County, Illinois; of all of which aforesaid matters only the Probate Court of St. Clair County, Illinois had full jurisdiction.

- [fol, 532] 5. That under the applicable rules of law, there was and is no substantial evidence in this case showing or tending to show that defendant, its agents or servants was or is guilty of any actionable fraud whatever.
- 6. That under the applicable rules of law, there was and is no substantial evidence in this case showing or tending to show that defendant was or is guilty of any actionable duress whatever.
- 7. That under the applicable rules of law, there was and now is no substantial evidence in this case impeaching or tending to impeach the execution by the plaintiff of the release offered in evidence in this case.
- 8. That under the applicable rules of law, there was and now is no substantial evidence in this case showing or tending to show that there was any fraud or duress whatever in the matter of the execution of the release offered in evidence, nor is there any substantial evidence showing or tending to show that the plaintiff, at the time she executed the release in question did not know that she was executing a full release, discharging the defendant from all claims, demands, actions or rights of action that she then had or might thereafter have as such administratrix against the defendant by reason of the fatal injuries to her intestate.

Wherefore defendant respectfully asks that the Court may hold as above specifically prayed and direct the jury to return a verdict in favor of defendant." On the grounds,

- No. 1. That there was and is no substantial evidence adduced in this case showing, or tending to show that de-[fol. 533] fendant herein was, or is guilty of actional negligence, or want of duty charged in the petition.
- No. 2. There was and is no substantial evidence adduced in this case that any actionable negligence, or want of duty whatever of defendant was or is the direct and proximate cause of the fatal injuries received by plaintiff's intestate as charged in the petition.
- No. 3. There was and is no substantial evidence whatever in this case showing, or tending to show any violation of any duty as charged in the petition.
- No. 4. That plaintiff can not recover in this case because all the substantial evidence herein unequivocably shows that plaintiff, as administratrix, petitioned the Probate Court of St. Clair County, Illinois, to settle her claim against defendant, as such administratrix, for Five Thousand Dollars, and that upon her petition the order was granted and that she settled and released her claim as such administratrix for Five Thousand Dollars, and the said Five Thousand Dollars was paid her as such administratrix, and that she received and accepted the same in settlement thereof, and that thereafter she filed a petition in said. Probate Court to set aside the settlement, which the said Probate Court denied; and that this cause is a collateral attack on the said orders and judgment of the Probate Court of St. Clair County, Illinois, of which matters said Probate Court had full jurisdiction.
 - No. 5. That there was and is no substantial evidence in this case showing, or tending to show that the defendant, its servants or agents was or is guilty of any actionable negligence or fraud whatever.
 - [fol. 534] No. 6. That there was and is no substantial evidence in this case showing, or tending to show that defendant was or is guilty of any actionable duress whatever.
 - No. 7. That there was and is no substantial evidence in this case impeaching or intending to impeach the execution by plaintiff of the release in evidence in this case.

No. 8. That there was and is no substantial evidence in this case showing, or tending to show any fraud, or duress whatever in the execution of the release, or that plaintiff at the time she executed the release did not know that she was executing a full release discharging defendant from all claims.

П.

The said United States District Court erred in refusing a request of the defendant for a motion for a directed verdict, that is, an instruction or charge to the jury in the nature of a demurrer to the evidence offered by defendant at the close of the entire case and evidence to find for defendant, which requested charge is as follows:

"At the close of the entire evidence and case, the defendant herein, Southern Railway Company, moves the Court to direct the jury to find a verdict in favor of defendant and against plaintiff, for the reasons following:

- 1. That under the applicable rules of law, there was and is no substantial evidence adduced in this case showing or tending to show that defendant herein was or is guilty of any actionable negligence or want of duty whatever as charged in the petition.
- 2. That under the applicable rules of law, there was [fol. 535] and is no substantial evidence adduced in this case that any actionable negligence or want of duty whatever of defendant was and is the direct and proximate cause of the fatal injuries received by plaintiff's intestate as charged in the petition.
- 3. That under the applicable rules of law, there was and is no substantial evidence whatever in this case showing or tending to show any violation of any duty as charged in the petition.
- 4. That under the applicable rules of law, plaintiff cannot recover in this case, because the substantial evidence herein unequivocably shows that plaintiff filed in the Probate Court of St. Clair County, Illinois, a petition, duly signed and verified by her, praying that, as administratrix of the Estate of John R. Stewart, deceased, the said Probate Court order that, as such Administratrix, she be allowed, for the sum of Five Thousand Dollars, in full set-

tlement of all claims and demands on account of the fatal injuries to John R. Stewart, deceased, to accept said sum of money, and to execute and deliver to said defendant a release in writing, fully releasing, settling and satisfying all claims, demands and rights of every kind, nature and description which she, as such administratrix of said estate, had on account of the fatal injuries to said deceased; that said petition was presented to said Probate Court and said Probate Court entered an order approving said settlement for Five Thousand Dollars and authorized her, as such administratrix, to settle said claim with defendant and to execute and deliver to said defendant a full and complete release upon the payment of said sum of money; that in consideration of the execution of a full and com-[fol. 536] plete release by her, as such administratrix, the defendant herein paid her the sum of Five Thousand Dollars, as such administratrix, and, as such administratrix, she executed and delivered to defendant a release, thus, releasing and discharging defendant from all claims, demands, actions, and rights of action that she then had or might thereafter have, as such administratrix, against defendant by reason of the fatal injuries to John R. Stewart, deceased, and specifically accepted the sum of Five Thousand Dollars in full settlement of this cause of action and appropriated the said sum of money to her own use as such administratrix; that thereafter she filed a petition in said Probate Court of St. Clair County, Illinois, and moved said Court to set aside the settlement of said claim and cause of action herein, which said petition, to set aside the settlement and approval of settlement for fatal injuries to her decedent, the said Probate Court of St. Clair County, Illinois, denied. On these facts, the defendant moves the Court to direct the jury to find a verdict in its favor, because, as the authority of plaintiff to settle as such administratrix or the settlement thereunder had not been revoked or set aside by the Probate Court, or some other court of competent jurisdiction in Illinois, if any, this cause of action is a collateral attack on the orders and judgments of said Probate Court of St. Clair County, Illinois; of all of which aforesaid matters only the Probate Court of St. Clair County, Illinois had full jurisdiction.

- 5. That under the applicable rules of law, there was and is no substantial evidence in this case showing or tending to show that defendant, its agents or servants was or is [fol. 537] guilty of any actionable fraud whatever.
- 6. That under the applicable rules of law, there was and is no substantial evidence in this case showing or tending to show that defendant was or is guilty of any actionable duress whatever.
- 7. That under the applicable rules of law, there was and now is no substantial evidence in this case impeaching or tending to impeach the execution by the plaintiff of the release offered in evidence in this case.
- 8. That under the applicable rules of law, there was and now is no substantial evidence in this case showing or tending to show that there was any fraud or duress whatever in the matter of the execution of the release offered in evidence, nor is there any substantial evidence showing or tending to show that the plaintiff, at the time she executed the release in question did not know that she was executing a full release, discharging the defendant from all claims, demands, actions or rights of action that she then had or might thereafter have as such administratrix against the defendant by reason of the fatal injuries to her intestate.

Wherefore defendant respectfully asks that the Court may hold as above specifically prayed and direct the jury to return a verdict in favor of defendant."

On the grounds,

- No. 1. That there was and is no substantial evidence adduced in this case showing, or tending to show that defendant herein was, or is guilty of actionable negligence, or want of duty charged in the petition.
- No. 2. That there was and is no substantial evidence ad-[fol. 538] duced in this case that any actionable negligence, or want of [futy] whatever of defendant was or is the direct and proximate cause of the fatal injuries received by plaintiff's intestate as charged in the petition.

- No. 3. There was and is no substantial evidence whatever in this case showing, or tending to show any violation of any duty as charged in the petition.
- No. 4. That plaintiff cannot recover in this case because all the substantial evidence herein unequivocably shows that plaintiff, as administratrix, petitioned the Probate Court of St. Clair County, Illinois, to settle her claim against defendant, as such administratrix, for Thousand Dollars, and that upon her petition the order was granted and that she settled and released her claim as such administratrix for Five Thousand Dollars, and the said Five Thousand Dollars was paid her as such administratrix, and that she received and accepted the same in settlement thereof, and that thereafter she filed a petition in said Probate Court to set aside the settlement, which the said Probate Court denied; and that this cause is a collateral attack on the orders and judgments of the Probate Court of St./Clair County, Illinois, of which matters said Probate Court had full jurisdiction.
 - No. 5. That there was and is no substantial evidence in this case showing, or tending to show that the defendant, its servants or agents was or is guilty of any actionable negligence or fraud whatever.
 - No. 6. That there was and is no [substnait] evidence in this case showing, or tending to show that defendant was [fol. 539] or is guilty of any actionable duress whatever.
 - No. 7. That there was and is no substantial evidence in this case impeaching, or intending to impeach the execution by plaintiff of the release in evidence in this case.
 - No. 8. That there was and is no substantial evidence in this case showing, or tending to show any fraud, or duress whatever in the execution of the release, or that plaintiff at the time she executed the release did not know that she was executing a full release discharging defendant from all claims.

Ш.

The United States District Court erred in charging the jury, over the objection and exception of defendant, as follows:

"You are instructed that it was the duty of the deceased, in the performance of his work, before going between the [fol. 540] cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, extending on the outside of the car, and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars, if you find he did go between the ends of the cars."

On the grounds that said charge is an incorrect statement of the law, for two reasons.

1st. Because it puts the burden of proof on the defendant initially to show that no effort was made.

2nd. Because it is a legal presumption which is wholly unwarranted by the law, and that such operation of the court's charge conflicts with the other portions of the charge in which the jury is told that the burden of proof that is necessary to warrant a recovery by plaintiff rests upon plaintiff throughout the trial; that the fact that the coupler would not work is presumed and it is in conflict with that portion of the court's charge.

IV.

That the United States District Court erred in charging the jury, over the objection and exception of defendant, as follows:

"If you find and believe from the evidence that defendant, through its agents and servants, in the effort to induce plaintiff to make the settlement mentioned in the evidence, committed acts and used language for the purpose of leading plaintiff to believe that unless she made the settlement her son-in-law would lose his employment with the Terminal Railroad Association, and that plaintiff did so believe, and because thereof, if you so find, was put [fol. 541] in such a state of fear as to be unable to act of her own free will, and that while under such fear and while unable to act of her own free will, if you so find, she agreed to the settlement, and did the things mentioned in the evi-

dence in connection therewith; and if you further find and believe from the evidence that plaintiff would not otherwise have made the settlement; and if you further find that after the settlement was made plaintiff promptly rescinded the contract of release, and tendered to defendant the amount paid under such settlement, then, you are instructed that the contract of release and settlement was not binding upon this plaintiff and should be disregarded by you."

On the ground that the Court's charge wholly failed to define duress and that the charge with respect to duress in which is contained the hypothesis upon which the jury is told it may find duress, does not contain the facts necessary to constitute duress under the law, but permits the jury to base its finding upon a foundation of duress without the finding of any of the necessary facts which, under the law, constitute duress and that it failed to find any fact showing the existence of any fraud or duress in any way: and that the Court's charge announced to the jury a hypothesis upon which they may find that plaintiff acted under duress, for the reason that the sole hypothesis therein is the fact that Hamm was threatened with the loss of his job and that plaintiff relied upon and believed that threat and was caused to sign the release thereby; for the reason that such facts are wholly insufficient to constitute any duress, or fraud of any kind or character and each and every portion of the Court's charge hypothesizing a ver-[fol. 542] dict for plaintiff based upon any fraud, or any duress, is wholly unsupported in the evidence in this case.

V.

The United States District Court erred in refusing a request by defendant to charge the jury as follows:

"If you decide that plaintiff is entitled to a verdict, then the Court charges you that you should also consider that you are giving her a verdict in a lump sum that would otherwise have come to her decedent in installments over a long period of time, and, of course, that would make whatever lump sum you decide to give, if you decide plaintiff is entitled to a verdict, necessarily much less than the aggregate of the amount he would be paid each day if working."

On the ground that it was the duty of the jury to consider, if they awarded plaintiff a verdict, that a lump sum given her ought to be much less than the aggregate of the amount he would be paid each day if working.

VI.

The United States District Court erred in refusing the request of defendant to charge as follows:

"The plaintiff is an interested person. You should scrutinize the testimony of an interested witness with special care to ascertain whether or not his or her interest has caused him or her to testify falsely or color his or her testimony."

On the ground that plaintiff was an interested witness and that the jury had the right to scrutinize the testimony [fol. 543] of an interested witness to ascertain whether his or her interest had caused false, or the coloring of testimony.

VIL

The United States District Court erred in refusing the request of defendant to charge as follows:

"The Court charges the jury that if you find that plaintiff's decedent was injured by some act of his own not connected with a coupler, then the coupler would not be the proximate cause of his injury and plaintiff cannot recover. By proximate cause is meant that which in a natural and a continuous sequence, unbroken by any intervening cause, which produces an event and without which an event would not have occurred. A proximate cause is that which is nearest in the order of responsible causations."

On the ground that if plaintiff's decedent was injured by some act not connected with the coupler, then the coupler would not be the proximate cause of his injury and plaintiff cannot recover, and on the further ground that the word "proximate" should have been defined in order that the jury might intelligently understand the issues.

VIII:

The United States District Court erred in refusing, at the request of defendant, to charge the jury as follows: "The Court charges the jury that in determining what weight you will give to the testimony of a witness, you should take into consideration his or her interest, if any, in the outcome of the litigation, and any other facts or circumstances which you consider affect his or her credibility."

[fol. 544] On the ground that the jury in order intelligently to understand the issues should have been charged that in determining what weight was to be given the testimony of a witness, his or her interest should have been taken into consideration.

IX.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court charges the jury in this case that it is not disputed that the car or cars in question were equipped with couplers that would couple automatically by impact."

On the ground that there was no dispute that the car or cars in question were equipped with couplers that would couple automatically by impact.

X.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court charges you that by the expression, 'Greater weight or preponderance of the evidence,' the court means that evidence which has the greater weight with respect to its credibility."

On the ground that it was error to refuse to define the term for the jury to understand what was meant by the greater weight, or preponderance of the evidence.

XI.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows: [fol. 545] "The Court instructs the jury that if you believe from the evidence in this case that the plaintiff, Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, understood that she was signing a release, fully releasing and discharging the Southern Railway Company

of any and all liability, by reason of the death of John R. Stewart, or, if you believe from the evidence that if the plaintiff did not so understand and that later by her actions confirmed and ratified the execution of the release in question by petitioning the Probate Court of the County of St. Clair and State of Illinois for an order approving and confirming the release executed by her, then, in either event, the release is a bar to the plaintiff's action, and it is your duty to find the issues for the defendant, Southern Railway Company."

On the ground that the Court's charge failed to submit the matter that plaintiff herein knew and understood what she was doing when she signed the release, but later confirmed and ratified the execution of the release in question by petitioning the Probate Court for an order approving and confirming the release, then in their finding the verdict should be for defendant for the reason that such portion of the charge would have properly declared the law applicable to the facts herein, instead of the charge which the Court did give to the jury which improperly declared the law as applied to these facts and with special referencethereto.

XII.

The United States District Court erred in refusing to give the jury, at the request of defendant, an instruction [fol. 546] as follows:

"The jury is instructed that if you believe from the evidence that at the time of the execution of the release offered in evidence, the plaintiff, Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, was mentally capable of understanding what she was doing, and if you further believe from the evidence that she understood that she had signed a release, releasing the Southern Railway Company of all liability for the death of the deceased, John R. Stewart, or if you believe that by the exercise of her ordinary faculties she could have ascertained such fact, then it is your duty to find the issues for the defendant, Southern Railway Company."

On the ground that the Court failed to include in its charge that the matters submitted to it in writing an in-

struction which would have informed the jury that if it a found from the evidence that plaintiff was mentally capable of understanding what she was doing, and by the exercise of her ordinary faculties could have ascertained such facts when she executed the release, then the release was binding upon plaintiff and the charge would have properly declared the law as applicable to the facts in this case.

XIII.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court instructs the jury that you have no right to disregard the release in evidence because of any conduct, if any there be, on the part of the defendant, or its agents, which relates solely to the consideration for which such [fol. 547] release was given. You are further instructed that if Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, signed the release in question with knowledge that she was releasing all claims for liability for the death of the said John R. Stewart, and there was no fraud or duress in the actual execution of the release, then, and in that case, the release is valid and binding upon the plaintiff, Mary Stewart, Administratrix of the estate of John R. Stewart, and you should find the issues in favor of the defendant, Southern Railway Company."

On the ground that there is and was no fraud, or duress shown in the actual execution of the release and defendant was entitled to have the jury charged that unless there was fraud, or duress shown in the actual execution of the release, the release was and is binding upon plaintiff in this case.

XIV.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court charges the jury that if the jury believe from the evidence that the said Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, ratified and confirmed her action in executing the release in evidence by filing her sworn petition in the Probate Court of the County of St. Clair and State of Illinois, requesting said Probate Court to enter an order approving said release executed by the said Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, then it is your duty to find the issues in favor of the defendant, Southern Railway Company."

[fol. 548] On the ground that by her acts subsequent to the execution of the release she ratified the probate and all proceedings leading up to the execution of the release.

XV.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court charges you gentlemen of the jury that if you believe from the evidence that Mary Stewart, Administratrix of the estate of John R. Stewart, deceased, signed the release in question and received from the defendant, Southern Railway Company, or its agents, the sum of money therein mentioned, namely \$5000, then your verdict should be for the defendant, Southern Railway Company, unless you further believe from a preponderance of the evidence that the plaintiff at the time she signed said release, and at the time she petitioned the Probate Court of the County of St. Clair and State of Illinois for an order confirming and approving said release, she did not know or understand or could not, by the exercise of ordinary care, know that she was signing a full and complete release to the defendant in the premises."

On the ground that said instruction properly hypothesized the facts with respect to duress, and that they are not hypothesized in any other portion of the Court's instructions.

XVI.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court charges the jury that if you find and believe from the evidence that plaintiff, Mary Stewart, was duly appointed Administratrix of the estate of John R. [fol. 549] Stewart, deceased, by the Probate Court of St. Clair County, Illinois, on or about April 16, 1937, and that thereafter she filed in said Probate Court, a petition duly signed and verified by her, in and by which petition plaintiff represented that defendant had offered and agreed. provided a full release could be obtained, to pay her, as Administratrix of the estate of John R. Stewart, deceased. the sum of Five Thousand Dollars in full settlement of all claims and demands on account of the fatal injuries to said deceased; and that she prayed in said petition that an order be entered in said Probate Court approving said settlement and authorizing and directing plaintiff, as such administratrix to make such settlement, and, upon payment to her of Five Thousand Dollars, to execute and deliver to defendant herein a release in writing, fully releasing, settling, satisfying and determining all claims, demands, and right of action of every kind, nature and description which she, as such administratrix of said estate, had on account of the fatal injuries to said deceased; and that on or about November 30, 1937, the said petition was presented to said Probate Court and that an order was entered in and by said Probate Court in and by which said settlement was approved and plaintiff was authorized, as such administratrix, upon the receipt of the sum of Five Thousand Dollars, to settle said claim and to execute and deliver to defendant a full and complete release, settling. satisfying and discharging all claims, demands, actions and causes of action of every kind, nature and description which she, as such administratrix, had against defendant on ac-[fol. 550] count of the fatal injuries to John R. Stewart, deceased; and if you further find and believe from the evidence that on or about November 30, 1937, the plaintiff, as Administratrix of the Estate of John R. Stewart was paid the sum of Five Thousand Dollars by defendant, and that she, as such administratrix executed a release to defendant, releasing and discharging it from all claims, demands, actions and rights of action that she then had or might thereafter have against defendant herein by reason of the fatal injuries to John R. Stewart, deceased; and if you further find and believe from the evidence in this case that defendant herein gave plaintiff, as such Administratrix a check or draft in consideration of said release and that plaintiff, as such administratrix cashed said check or draft; and that, on or about December 10, 1937, plaintiff as such Administratrix filed in the Probate Court of St. Clair Countiy, Illinois, a petition to set aside the settlement of her claim as such Administratrix against defendant herein and that on or about January 31, 1938, in the Probate Court of St. Clair County, Illinois, the petition of Mary Stewart, as Administratrix of the Estate of John R. Stewart, deceased, to set aside the settlement for fatal injuries to her decedent, by the Probate Court of St. Clair County, Illinois, was denied, then your verdict must be for defendant, Southern Railway Company."

On the ground that the Probate proceedings in the Probate Court of St. Clair County, Illinois, can not be collaterally attacked in this case until they are set aside and that they constitute a bar to the further progress of this action until set aside by motion, or by direct proceeding.

XVII.

[fol. 551] The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court charges the jury that you have no right to disregard the release in evidence on the ground of any inadequacy or insufficiency of the consideration named herein."

On the ground that any inadequacy or insufficiency of consideration was not a matter to be considered by the jury in determining the liability of the defendant.

XVIII.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court charges the jury that if you find and believe from the evidence in this case that on or about November 30, 1937, the day of the settlement, neither witness Haun nor Wiechert said to plaintiff, or her daughter, Mrs. Hamm, or her son-in-law, Hamm, that Hamm could lose his job, and it had been done, if he did not obey orders and that he could be fired if he did not bring plaintiff to the office, then plaintiff cannot recover and your verdict must be for defendant."

On the ground that the fact that neither Haun, nor Wiechert told plaintiff, or her daughter, or her son-in-law,

Hamm, that Hamm could lose his job, it had been done, if he did not obey orders, and that he could be fired if he did not bring plaintiff to the office, was a proper issue for the jury.

XIX.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

[fol. 552] "You are instructed that the term 'duress' means actual or threatened violence or restraint of one's person contrary to law, to compel a person to enter into a contract or to discharge one. Therefore you are instructed that duress will not prevail to invalidate a contract entered into with full knowledge of all the facts, with ample time and opportunity for investigation, consideration, consultation, reflection and no restraint, actual or threatened of his freedom of action.

You are further instructed that if you find and believe from the evidence herein that at the time plaintiff executed the release mentioned in evidence she understood what she was doing and had full power to execute or refuse to execute the release, insofar as actual or threatened restraint of her freedom of action was concerned; And if you further find and believe from the evidence, that before executing such release she consulted with other members of her family and was under no restraint of any kind imposed or threatened by the defendant, then you cannot find that she executed said release while under duress imposed by defendant.

You are further instructed that even though you find from the evidence herein that defendant's agents, servants and employees vexed and annoyed plaintiff in their efforts to persuade her to execute the release, such facts are wholly insufficient to prove that she executed the release while under duress. In this connection you are further instructed that before you can find that plaintiff executed the release in question under duress, you must find from the greater weight of the credible evidence that she was so over[fol. 553] whelmed by terror that she did not realize what she was doing at the time she executed said release."

You are further instructed that even though you may find from the evidence that plaintiff feared that unless she

executed the release mentioned in evidence her son-in-law would lose his job with the Terminal Railroad Association of St. Louis, you cannot find that she executed said release under duress, for the reason that such fear, whether well or ill-founded, is wholly insufficient in law to constitute duress because it did not threaten violence to her, or restraint of her person, or terrorize her so that her freedom of physical or mental action was suspended."

On the ground that said court failed and refused to charge the jury with respect to the facts necessary to constitute duress in the manner requested by defendant which was submitted to the Court and which the Court refused to give, which instruction contains the facts necessary to constitute duress or fraud under the law and permits the jury to determine the matter of duress, or fraud under a proper hypothesis.

XX.

The United States District Court erred in refusing to instruct the jury, at the request of defendant, as follows:

"The Court charges the jury that before you can find for plaintiff in this case it is necessary for you to find from the preponderance or greater weight of the evidence that plaintiff's decedent, John R. Stewart, was acting within the scope of his employment in going between the cars and that it was necessary for him in the discharge of his duties to go between the cars to couple or uncouple them."

[fol. 554] On the ground it was proper to charge the jury that it was necessary to find from the preponderance, or greater weight of the evidence that decedent was acting within the scope of his employment in going between the cars and that it was necessary for him to do so in the discharge of his duties, and that said instruction properly declares the law and there is no other portion of the Court's charge on that subject.

XXI.

The United States District Court erred in refusing to charge the jury, at the request of defendant, as follows:

"The Court charges the jury that even though you may find and believe from the evidence in this case that one Hamm, plaintiff's son-in-law, was employed by the Ter-

minal Railroad Association of St. Louis, and that he was called to the Legal Department of the Terminal Railroad by Joseph L. Howell, its attorney, on or about November 23, 1937, and that said Howell told said Hamm that defendant was offering to pay plaintiff Five Thousand Dollars, clear, and that she was willing to take it, but that he (Hamm) was standing in the way, and that Hamm told Howell that he was because he did not want that woman gypped out of what money she gets, and that Howell then said to him, 'How about the Five Thousand Dollars,' and Hamm said 'That is all right to settle for that, if she gets the Five Thousand Dollars, but that he wanted it in writing, and that Howell advised said Hamm that if Bruce A. Campbell would say that plaintiff would get Five Thousand Dollars net and that plaintiff would be guaranteed by said Campbell that he would save her harmless on account [fol. 555] of any attorney fees to her said attorney on account of this suit for the fatal injuries to John R. Stewart, deceased, and that he (Howell) would guarantee whatever said Campbell said, yet, if you further find from the evidence in this case that the said Howell did not intimidate, coerce or threaten to cause the said Hamm to be discharged unless plaintiff would settle her cause of action, as administratrix of John R. Stewart, deceased, with defendant, and that the said Howell did not bring pressure or undue influence to bear on Hamm and did not threaten to have Hamm, plaintiff's son-in-law, discharged from his job with the Terminal Railroad Association of St. Louis, unless plaintiff settled this case, then you must not consider the act of Howell in calling Hamm, plaintiff's son-in-law to the Legal Department of said Terminal Railroad Association of St. Louis as evidence of fraud or duress."

On the ground that the conversation between Mr. Howell and Mr. Hamm which appears in evidence was wholly insufficient upon which to base a charge of fraud, or duress, and that such hypothesis is not submitted by any other portion of the Court's charge.

XXII.

The said United States District Court erred in refusing to admit in evidence, at the request of defendant, and in sustaining plaintiff's objections to the admission of Defendant's Exhibits 4, 5, 6, 7, 8 and 9, and each of them separately, as follows:

[fol. 556] (Deft's, Ex

(Deft's. Ex. 4 6/9/39 CPA).

In The Probate Court of St. Clair County, Illinois.

In the Matter of the Estate of John R. Stewart, deceased.

Order.

And now on this 30th day of November, A. D. 1937, being one of the judicial days of the November Term of this court, comes Mary Stewart, widow of John R. Stewart, deceased, and administratrix of his estate, and files her verified petition praying that she may be authorized as such administratrix to settle all claims and demands that she may have as such administratrix against the Southern Railway Company on account of the fatal injuries received by said deceased on February 12, 1937, in his employment as a switchman for Southern Railway Company, from which injuries said deceased died on the 14th day of February, 1937, and that at the time of said injuries said deceased and said Southern Railway Company were engaged in interstate commerce, and that said Southern Railway Company has offered and agreed, provided a full and complete release can be obtained, to pay to said administratrix the sum of Five Thousand Dollars (\$5000.00), in full settlement of all claims and demands on account of said fatal injuries to said deceased.

Said petitioner further represents that one Charles P. Noell, whose business address is 1502 Telephone Building, in the city of St. Louis, Missouri, claims to have a lien for attorney fees on the amount which petitioner receives in [fol. 557] settlement of said claim, and that any such lien which the said Charles P. Noell may claim is null and void and of no force and effect, and that said Charles P. Noell is not entitled to any attorney fees or any lien for attorney fees on said setlement, and further prays that an order be entered by the Court herein directing that said Charles P. Noell be notified to appear in this cause by a short day to be fixed by the Court, to assert and present his claim, if any, for attorney fees or lien for attorney fees against said administratrix arising out of said settlement.

And the Court having examined said petition and having heard evidence in support thereof, and being fully advised in the premises, doth find that the Court has jurisdiction of the subject matter and of the parties to this proceeding; that the payment of the sum of Five Thousand Dollars (\$5000.00) to said administratrix of said estate in full settlement of all claims and demands, actions and causes of action accrued to her as such administratrix by reason of the fatal injuries to said deceased, John R. Stewart, received at the time and place aforesaid, will be the payment under all circumstances of a reasonable, just and proper amount therefor, and that it is for the best interests of said estate and all persons interested therein that said settlement be made, and upon the payment of the same that a full release be given to the said Southern Railway Company.

It Is, Therefore, Ordered And Adjudged by the Court that said settlement be and the same is hereby approved, and that upon receipt of the sum of Five Thousand Dollars (\$5000.00) the said administratrix of the estate of said [fol. 558] deceased be and she is hereby authorized to settle said claim and to execute and deliver to the said Southern Railway Company a full and complete release settling, satisfying and discharging all claims, demand, actions and causes of action of every kind, nature and description which she, the said administratrix of said estate, has against said Southern Railway Company on account of said fatal injuries to said deceased as aforesaid.

It Is Further Ordered And Adjudged that the claim of one Charles P. Noell for attorney fees or lien for attorney fees against said administratrix on account of said settlement be and the same is set for hearing at 9:30 A. M., on the 10th day of December, 1937, at which time the said Charles P. Noell shall appear and present his claim for such attorney fees or lien for attorney fees.

It Is Further Ordered And Adjudged that the Clerk of this court shall immediately send to the said Charles P. Noell addressed to him at 1502 Telephone Building, St. Louis, Missouri, a certified copy of this order, by registered United States mail, which shall constitute notice to the said Charles P. Noell of the hearing before this Court of his claim for attorney fees or lien for attorney fees.

It Is Further Ordered And Adjudged that the administratrix make no distribution of said amount so received in settlement from Southern Railway Company until the further order of this court.

(Signed) PAUL H. REIS, Judge."

[fol. 559] (On the back of said order, Defts. Ex. 4, appears the following notation:)

"62-531 Estate of John R. Stewart, Dec'd.

Order for Settlement.

Filed Nov. 30, 1937 L. O. Reinhardt, Probate Clerk."

(Defts. Ex. 5 6/9/39 CPA).

"In the Probate Court of St. Clair County, Illinois.
In the Matter of:

The Estate of John R. Stewart, Deceased.

Petition for Setting Aside Order Authorizing Settlement.

Petitioner states that she is the duly appointed, qualified and acting administratrix of the estate of John R. Stewart, deceased.

That on the 30th day of November, 1937, she filed a petition before your Honor praying for authority to settle her claim for the wrongful death of her husband.

Petitioner states that the papers signed by her praying for authority to settle her claim were signed as a result of fraud and duress on the part of the Southern Railroad Company, and its agents and attorneys.

That since the filing of the Petition for authorization to settle her claim, she has tendered back the money paid to her and has now pending in the Federal Court in St. Louis, Missouri, a Motion to Set Aside the Dismissal of the case and to reinstate it on its docket.

Wherefore, petitioner prays an order of this Court [fol. 560] setting aside and holding for naught the order of

this court of November 30th, 1937, wherein petitioner was granted authority to settle her claim against the Southern Railroad Company for the wrongful death of her husband.

(Signed) MARY STEWART,

Administratrix.

Subscribed and sworn to before me this 8th day of December, 1937.

(Seal)

(Signed) MAX C. NELSON, Notary Public.

My commission expires January 7, 1938."

(On the back of said Defendant's Exhibit 5 appears the following words and figures:)

"Dec. 10, 1937. Hearing on within petition set for January 7, 1938 9 A. M. Clerk to send notice.

(Signed) PAUL H. REIS, Judge.

In the Probate Court of St. Clair County, Illinois.

In the matter of the Estate of John R. Stewart, Deceased. Filed Dec. 10, 1937 L. O. Reinhardt, Probate Clerk. Petition for setting aside order authorizing settlement."

(Defts. Exb. 6, 6/9/39 CPA)

"Docket of the Probate Court of St. Clair County, Illinois.

Attorneys. Classin. Parties In the Matter of the Estate of John R. Stewart, Deceased, Mary Stewart, petitioner. Docket entries. Date 16 April Term A. D. 1937. Proof of death duly made, Petition of Mary Stewart for letter of administration to issue to the petitioner presented. Proof of heirship duly made, Court finds that deceased left sur-[fol. 561] viving him Mary Stewart his widow Clarence Stewart, Minnie Ham, Roland Stewart his children as his sole and only heirs at law.

Ordered that letters issue to the petitioner upon filing her oath as administratrix and bond in the sum of \$1000.00.

Oath and bond filed. Bond approved and appointment made. Adjustment to the June Term A. D. 1937.

November Term A. D. 1937.

30 Petition of the administratrix for authority to compromise for claim of wrongful death of deceased presented. Ordered that administratrix be authorized to compromise claim as per written order on file. Record 62 Page 96

December Term, A. D. 1937. Record 62 Page 531

10 Petition of Mary Stewart to set aside order on compromise presented. Hearing on petition set for January 7th, 1938, 9 A. M. clerk to notify petitioner.

January Term A. D. 1938. Record 62 Page 562

31 Petition of the Southern R. R. Co. to intervene in the motion heretofore filed in behalf of Mary Stewart administratrix, to set aside settlement for wrongful death of the deceased. Motion granted. Motion of Mary Stewart to set aside approval of settlement for fatal injuries to her decedent denied. Record 63 page 52."

(Defts. Exb. 7 6/9/39 CPA)

"In the Probate Court of the County of St. Clair, State of Illinois.

In the Matter of:

The Estate of John R. Stewart, Deceased.

And now comes the Southern Railway Company, a cor[fol. 562] poration, by Phillip G. Listeman, its attorney,
and respectfully moves the Court that it may be permitted
to intervene and become a party to the hearing on the motion by Mary Stewart, administratrix of said estate, to set
aside order of this Court entered on November 30, 1937,
approving settlement of her suit against the Southern
Railway Company, and authorizing the dismissal of the
same in the District Court of the United States for the
Eastern District of Missouri, and in support of this motion Southern Railway Company says:

That said motion involves the question of whether or not an order of this Court authorizing and directing said Mary Stewart, as Administratrix as aforesaid, to settle her suit against the Southern Railway Company on account of fatal injuries received by her husband and intestate while employed by the Southern Railway Company, and the dismissal of the suit brought by her as administratrix against the Southern Railway Company, in the District Court of the United States for the Eastern District of Missouri, to recover damages on account of the same, be set aside.

Southern Railway Company avers that it has paid the amount of said settlement and taken a release from the said Mary Stewart, Administratrix as aforesaid, and has, in all respects, complied with the provisions of the order of this Court on November 30, 1937, aforesaid.

Southern Railway Company further says that the hearing, order and judgment of said motion may affect an interest or title which it has, namely, its interest or title in the settlement made as aforesaid, the release executed by [fol. 563] the said Mary Stewart, as Administratrix as aforesaid, in accordance with the said order of this Court, and the payment of the money by the Southern Railway Company to her.

Southern Railway Company, therefore, represents under Section 25 of the Civil Practice Act of the State of Illinois that it has an interest or title, as above set forth, which the judgment and order of this Court on said motion may affect, and it, therefore, asks under said Section 25 of the Civil Practice Act for permission of this Court to intervene upon the hearing of this motion, and to be made a party thereto.

All of which is respectfully submitted.

SOUTHERN RAILWAY COMPANY, By (Sgd.) Philip G. Listeman."

"State of Illinois, County of St. Clair—ss.

. H. B. Haun, being first duly sworn on his oath, deposes and says that he is Claim Agent of the Southern Railway Company, having jurisdiction in the County of St. Clair in the State of Illinois, and other counties in Illinois, Indiana and Missouri; that he has full knowledge of the facts set forth in the foregoing petition and that he is authorized to make this affidavit. That he has read over the above and foregoing petition and is fully acquainted with the facts set forth therein, and that the facts set forth therein are true and correct as therein stated.

(Signed) H. B. HAUM.

[fol. 564] Subscribed and sworn to before me this 31 day of January A. D. 1938.

(Signed) L. O. REINHARDT,

Probate Clerk.

By (Sgd) E. C. Shobart,

Dpy."

(On the back of said Deft. Exb. 7 appears the following)

"Estate of John R. Stewart. Petition of Intervention of Southern Railway Co. Filed Jan 31, 1938. L. O. Reinhardt, Probate Clerk."

(Defts. Exb. 8, 6/9/39 CPA)

"Chestnut 5838 Charles P. Noell, Attorney and Counselor at Law Suite 1502 Telephone Bldg., St. Louis

December 8, 1937. Leonard O. Reinhardt, Probate Clerk, Belleville, Illinois.

Dear Sir:

Enclosed please find Petition, which you will kindly file in the matter of the Estate of John R. Stewart.

Please call this to the attention of Judge Reis, and oblige.

Very truly yours,

(Sgd) CHAS. P. NOELL, Charles P. Noell."

CPN:JG

(On the back of said Deft. Exb. 7 appears the following) 10 1937 L. O. Reinhardt Probate Clerk."

(Defts. Exb. 9 6/9/38 CPA)

"In the Probate Court of the County of St. Clair, in the State of Illinois.

[fol. 565] In the Matter of:

The Estate of John R. Stewart, Deceased.

E. C. Schobert, being duly sworn, upon his oath deposes and says that he is and for more than one year last past has been the duly appointed, acting and qualified Deputy Clerk of the Probate Court of the County of St. Clair in the State of Illinois; that on the 30th day of November, A. D. 1937, as such Deputy Clerk as aforesaid, and acting for and on behalf of the Probate Clerk of said County and as his deputy, as aforesaid, in compliance with the order of this Court on that day entered in the above entitled cause, he did send by United States mail to Charles F. Noell at 1502 Telephone Building, St. Louis, Missouri, a certified copy of the order of said Court entered in said cause on the said 30th day of November, A. D. 1937. That said certified copy of said order was placed by this affiant in an envelope, which was duly sealed and then addressed to the said Charles P. Noell at 1502 Telephone Building, St. Louis, Missouri, and sufficient amount of United States postage was placed on the same for the sending of the same through the mail as a registered letter, with a return receipt requested; and the said envelope so addressed and stamped, as aforesaid, containing said certified copy of said order of this Court, as aforesaid, was deposited in the United States mail by this affiant on the said 30th day of November, A. D. 1937.

Affiant further says that afterwards he received the re-[fol. 566] turn receipt for such registered letter, which return receipt so received by him through the United States mail is attached hereto and made a part of this affidavit.

And further this affiant saith not.

(Signed) E. C. SCHOBERT.

Subscribed and sworn to by the said E. C. Schobert this 10th day of December, A. D. 1937.

(Signed) L. O. REINHARDT, Probate Clerk." (On the back of said Defts. Exb. 9 appears the following:)

"Estate of John R. Stewart, dec'd. Affidavit of mailing of notice to Chas. P. Noell. Filed Dec. 10, 1937. L. O. Reinhardt, Probate Clerk.

On the ground with respect to Exhibits 4, 5, 6, 7, 8 and 9, and each of them, that the Probate Court of St. Clair County, Illinois, though a Court of limited jurisdiction, had jurisdiction to grant letters of administration and to settle the estate of a decedent and a resident of said County who died as a result of an accident in that county, and that said Court had an inherent authority to grant the petition to settle the claim; and that a direct attack was made before and denied by said Probate Court; and on the further ground that this action is a collateral attack on the order and judgment of the Probate Court of St. Clair County, Illinois, and that the only way the order and judgment of the Probate Court of St. Clair County, Illinois, in this case may be set aside is to bring an action, or move to set the same aside in the proper tribunal, or court. That this could only be done by a motion in said Probate [fol. 567] Court, or by a direct proceeding to set the same aside; and on the further ground that under Article IV, Section 1 of the United States Constitution full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and this includes the United States and its Courts; that judgments of Courts, State and National, may not be reexamined on their merits and may not be impeached for fraud or duress in obtaining them unless a direct proceeding to set the same aside, if rendered by a Court having jurisdiction of the case and the parties; that judgments of State Courts are not subject to collateral attack in Federal Courts: that Courts of concurrent jurisdiction cannot set aside or modify the orders and decrees of other courts of like jurisdiction; and that judgments rendered by a Court of competent jurisdiction cannot be collaterally attacked on the ground that they are obtained by fraud, or duress.

XXIII.

The United States District Court erred in admitting in evidence the testimony offered by plaintiffs witness, Mary Stewart as follows:

- "Q. Now, did you learn from Mr. Hamm that he had had a talk with Mr.
 - A. Mr. Howell.
 - Q. Mr. Howell?
 - A. Yes, sir. He had been called to the office.
 - Q. What did Mr. Hamm say to you?

Mr. Davis: Now, we object to that, Your Honor. We are not bound by anything that Mr. Hamm said.

Mr. Sheppard: It is hearsay besides.

The Court: Overruled.

[fol. 568] To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Mr. Davis: And it is hearsay, besides it is self-serving.

Mr. Hay: I do not see or think that it needs any argument to show the admissibility of this, Your Honor. Mr. Hamm had been called in as testified to by Mr. Howell, for the express purpose of having him see if he could not accomplish a settlement of this case, and pursuant to that—

The Court: I passed on it. Go ahead.

Mr. Hay: I beg your pardon.

Q. What did Mr. Hamm say?

A. They had called him to the office to see Mr. Howell, and Mr. Howell asked him about this case. He said he did not know there were a case of that kind.

Q. That Mr. Howell said he did not know?

A. No, not until he told him, and he said that he had been notified to see if he could not urge the case along, and get me to take that amount of money, and he said he did not know him, and he did not want to, you know, to urge him, but he said just to see if he could not talk me into taking that amount, and then he told him to go and talk to Mr. Campbell.

Q. Did he say he had talked to Mr. Campbell?

A. He had to, yes. He said, 'You go, I would advise you to go'.

Q. What else did Mr. Hamm say?

A. Well, it meant his job, so he better go.

Mr. Davis: He said what?

[fol. 569] A. It meant his job, and he had better go.

Q. And what did he say to you with respect to the set-

tlement of the case, Mr. Hamm I am referring to?

A. Well, he said that he would not get it through the attorney, and that that might mean his job, and I better go see, he better go see the attorney, Mr. Campbell.

Q. Well, what effect did that have on you?

Mr. Davis: Well, we object to any effect it had on her.

Mr. Hay: That is the whole gist of this case, Your Honor.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

A. Well, Mr. Hamm said that they was not hiring men his age, or from his age to thirty years, and he might lose his job.

Q. Well, what did you say, or what was the effect on

you!

A. Well, I know he had been working for the company a long time, and if he would lose his job he might not get another one, and he had a family, a wife and two children to keep.

Q. Now, up to that time, Mrs. Stewart, had you ever indicated to anybody anywhere that you would take five

thousand dollars? A. No time.

Q. After Mr. Hamm told you that, what was your attitude toward the taking of the five thousand dollars?

A. Well, I was very worried, and at the time I thought well, he, if he would lose his job, they would suffer, and that is what I told him, that he would lose his job, he might [fol. 570] not get any more, and I was told by Mr. Wiechert, that it had been done, he could lose his job.

Q. I see. Was that after you had—

A. After I had the talk with Mr. Hamm and went to

Mr. Campbell's.

Q. Oh, I see. Now, pursuant to this talk with Mr. Hamm, you then went to the office of Campbell & Weichert?

A. Yes, sir.

Q. And you say that at that time Mr. Wiechert said to you, when reference was made to the possibility of Mr. Hamm losing his job, that that had been done?

A. It had been done, it could be done and it had been

done.

Q. Who was present when that conversation took place?

A. Well, my daughter and Mr. Felsen, and I think Mr.

Haun.

Q. Felsen, is that the lawyer that-

A. That was the attorney.

Q. That Mr. Campbell called in to- A. Yes, sir.

Q. Just a moment. Mr. Felsen, is that the lawyer that Mr. Campbell called in to represent you? A. Yes, sir.

[A]. And this took place in the office of Campbell & Wiechert, the attorneys for the Southern Railroad Company? A. Yes, sir.

Q. Had you ever been in that office before?

A. Never.

[A]. Had you ever seen either Campbell or Wiechert before?

A. I had seen Mr.—no, I don't think I had seen Mr. Wiechert. I seen Mr. Felsen, but not Mr. Wiechert. [fol. 571] Q. Mr. Felsen, you mean, came to see you with a Mrs. Pouch? A. Yes, sir.

Q. Before you hired a lawyer, is that right?

A. Yes, sir.

Q. All right. Now, after these conversations with Mr. Hamm and with Mr. Wiechert, what did you do?

A. How?

Q. What did you do after these conversations with Mr. Hamm and Mr. Wiechert, I mean with respect to agree-

ing to take five thousand dollars?

A. Well, I was just to where I did not know what [do] do, and the more I studied, I thought of those children that would suffer, you know, and if he would lose his job I knew they would suffer, and I took the money.

Q. You took the money?

A. When he said I would get it no other way.

Q. Now, it was after these conversations?

Yes, sir.

That all these papers were-

A. Were made out when I got there.

Q. May I ask, were the papers already made out when

you got there? A. Yes, sir.

- Q. But it was after that that you agreed to take the money, and then went over to Belleville and went through the form of a settlement? A. Yes, sir.
- Q. I see. And it was after that that you signed the release, was it? A. Yes, sir. [fol. 572] Q. Up to that time had you signed anything in connection with the settlement?

- A. I don't think I had. Q. Had you agreed with anybody to take five thousand dollars until after the talk with Mr. Hamm and Mr. Wiechert? A. No, sir.
- Q. Had you ever indicated to anybody that you would take five thousand dollars? A. No, sir.
- Q. Was five thousand dollars as much as you thought you ought to have? A. Why, certainly not.
- Q. The doctor was on the stand yesterday, and he testified that you had said to him when he came into the hospital to see your husband, that he had been on a drunk for three or four days.
- A. I do not see how he could be on a drunk when we hunted a house and moved, and straightened our things. A man drunk could not do that, I don't think.

Q. Did you make any such statement as that, to the effect- A. No, sir.

Q. Did you ever make a statement to him about his being drunk any time, make the statement to this doctor?

A. No. sir.

Did you ever make a statement to him?

A. No, sir.

Your husband did drink liquor? Q.

Oh, about like ordinarily a man would drink.

Do you know of any time of his being what you would call drunk?

I never seen him when he could not get around or [fol. 573] do anything he wanted to do at no time.

Q. He worked, as you testified before, fairly regularly, did he not? A. Regular, yes, sir.

Q. I believe something during the year before he was

killed he had something like poison ivy on him?

A. Well, Doctor Thie at the Missouri Pacific [—] something known as a child disease or breaking out. I had it first on my hand, and I went to the doctor, and he gave me a prescription, and I-went back for him.

Q. Was that during the last year of his life?

A. Yes, sir, the summer before.

Q. Did he lose some time as a result of that?

A. Yes, sir.

Q. Now, in the years before that, had he lost any time on account of such a thing as that ivy, mentioned?

A. Well, he had been a steady worker.

Q. I see. A. Yes, sir.

Q. And I believe you testified that he turned over, ordinarily turned over his pay check to you?

A. Yes, sir.

Q. And out of that you were supported and the family was supported? A. Yes, sir.

Q. I mean you and he were living together?

A. Yes, sir.

Q. Now, you say that during the years preceding this last year when he had this trouble, you say he worked steadily?

A. Yes, sir.

Q. Would you say he worked more or less steadily or

[fol. 574] otherwise than the last year of his life?

A. Sure, he has worked of course not the last year or two, but he has worked most every day. But the last year or two he figured that he should give some of the other men a break several days at a time.

Q. And when he laid off the extra man would get the

opportunity to work! A. Sure.

Q. I believe you stated that at the time of his death he was in good health?

A. Yes, sir. He was never sickly, he was never a sickly man at no time.

Mr. Hay: That is all.

Mr. Sheppard: Your Honor, just to keep our record straight, may we move to strike all the testimony with re-

spect to what her son-in-law, Hamm, told her, first for the reason that it is hearsay; second, for the reason that there is no evidence showing that he had any authority to speak on behalf of the defendant in this case; and third; that it does not tend to prove any issue of fraud or duress.

The Court: Overruled.

Mr. Sheppard: Save an exception."

Found in the Reporter's Transcript of the testimony on pages 211 to 219 inclusive.

On the ground that defendant is and was not bound by anything that Mr. Hamm said and that his testimony is and was hearsay and self-serving, and defendant was not bound by any affect it had on plaintiff, and on the ground that there is and was no evidence showing that Hamm had any authority to speak on behalf of the defendant in this case to plaintiff and it does not tend to prove any issue of fraud or duress.

[fol. 575]

XXIV.

The said United States District Court erred in admitting in evidence the testimony offered by plaintiffs witness, Mary Stewart, as follows:

"Q. How many children have they?

A. They have two.

Q. How old are they?

Mr. Davis: Well, that is objectionable, Your Honor. It is absolutely immaterial.

Mr. Hay: Well, I do not think it is, Your Honor.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. How old are they?"

Found in Reporter's transcript of the testimony on page 245.

On the ground that it was immaterial as to whether Mr. and Mrs. Hamm had any children.

XXV.

The said United States District Court erred in admitting in evidence testimony offered by plaintiffs witness, Minnie Hamm, as follows: &

"Q. Just tell us what was said in that conversation?

Mr. Davis: Now, Your Honor, we think that that, anything of that nature is self-serving. It is hearsay.

The Court: What conversation is this?

Mr. Davis: This is the conversation that Mrs. Hamm, Mrs. Stewart had with Hamm.

Mr. Hay: It was after the visit to Mr. Howell.

Mr. Davis: It is self-serving, may I say, and hearsay, and then there was nothing in that conversation that he related to her with Judge Howell that could possibly affect this case in any way.

[fol. 576] The Court: Well, of course, there is only one theory on which it is admitted. I admitted it on that theory.

The objection is overruled.

Mr. Davis: It undoubtedly could, Your Honor, if there was anything said, but there was nothing said.

The Court: I think it is justified. The objection is overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. Go ahead.

A. What was the question, please?

Mr. Hay: Read the question.

(Question read.)

Q. That is the conversation between Mr. Hamm and your mother with respect to what had transpired between Mr. Howell and Mr. Hamm.

A. Well, he related just the conversation as near as he could recollect it, that had gone on in Mr. Howell's office.

Q. Give us as near as you can what he told your mother.

A. Well, he told, that he had been called over to the Legal Department, and that it is not ordinarily done.

Mr. Davis: Now, wait. Did he tell her it was not ordinarily done?

Af Yes, sir. It was out of the ordinary, and that he knew it had a meaning behind it, and he asked Mr. Howell just what he wanted to see him about, and he said, well, it was pertaining to his mother-in-law's case, he said he had not known there was a case.

[fol. 577] The Court: Now, don't say 'he'.

Mr. Hay: Mr. Howell.

The Court: "You confused it. Call names.

A. Mr. Howell told him that he had not known about it until he had been informed about it, by Mr. Campbell and Mr. Haun, and Mr. Haun's card was on the desk at the time. He handed it to my husband and he said it would be very good if he settled this thing.

The Court: Who said that?

The Witness: Mr. Howell. Beg pardon.

The Court: Told your husband?

The Witness: Told my husband, yes, told him it would be good if he would do his very best to settle the case, and since he had put himself in the thing, his own interest, my husband knew there was only one thing it could mean, was business.

Mr. Davis: I move that that be stricken out,

The Court: Sustained.

Mr. Hay: You understand, under the rules of evidence we have to eliminate certain things.

Q. Tell us what Mr. Hamm said to your mother, not what you thought about what Mr. Hamm said to your mother.

A. He told my mother it could only mean business, that they did not fool around inviting fellows ever from work like that to have conversations with them, and that they did not have to make a threat, their being interested in it was enough, and when they suggested—

Mr. Sheppard: Just a moment. We move to strike that out, Your Honor, first because it is not responsive to the [fol. 578] question. That is not what Mr. Howell said at all.

The Court: Let counsel make his objection.

Mr. Sheppard: First, because it is not responsive to the question for the reason that she is not telling what her husband said Mr. Howell said, she is telling what her husband told her mother; she is filling in the matter which is wholly incompetent in this case. It does not tend to prove fraud, duress or anything else, except how he felt about it, and deductions he drew from what had transpired previously. That certainly is as far from competent testimony as one could imagine.

The Court: I do not know. It seems to me if this testimony is competent at all it probably makes it all competent.

Mr. Hay: Yes.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Q. Go ahead.

The Court: It is now time that we recess, Mr. Hay. Announce a recess until 2:00 o'clock.

At this point 12:30 p. m., a recess was had until 2:00 p. m.

After recess, at 2:00 o'clock p. m., Monday, June 12, 1939, the following proceedings were had:

The Court: Proceed, Gentleman.

Direct Examination, Resumed.

By Mr. Hay:

Q. Mrs. Hamm, when we adjourned at recess I had [fol. 579] asked you to relate the conversation between your mother and Mr. Hamm following his visit to the office of Mr. Howell, and Mr. Campbell. Now, will you proceed and relate anything additional that was said during that conversation?

A. Well, since she had not been home when he had gone to Mr. Howell's office, he told her that he had gone

there, and that he and Mr. Howell had talked, and I won't need to tell the conversation, shall I, that was carried on in Mr. Howell's office?

Q. I want you [-] tell as fully as you can.

A. Well, he repeated that to my mother. Shall I state that?

Q. Now, understand, Mrs. Hamm, what I want is what was said between Mr. Hamm and your mother, not anything you thought about it, or who thought, but what was said. Just go ahead and relate all that you can recall of that.

A. He told her he had gone to Mr. Howell's office, and that he had asked him about my mother's case with the Southern, and he would-like that my mother settle this matter; and my husband told my mother that it would be a very good thing to do because him being called in there, it seemed that his company's interest was aroused towards this thing, and it would be the best thing concerning my husband's position to have her go down and settle the thing; that this wire had been sent to my husband which connected him more than ever with it, so he thought that was the only, rather he told her that was the only thing to do, since he was concerned in it, and she and I both thought it was too, regardless of what the terms might be, when we got there. We all went down there then.

Q. Then you went down to the office?

[fol. 580] A. Yes, sir.

Q. Of Mr.— A. Campbell.

Q. Campbell?

A. He was not present, but Mr. Wiechert had his position in the—

Q. Now, something was said here about your having been at the office of Mr. Campbell before that. Had you?

A. Yes. After we received this telegram, it was impossible to get her there at the date set, and after all it was Thanksgiving Day, the date mentioned on the telegram, the 27th of November, I think it was.

Q. Yes.

A. And so I went down to tell Mr. Campbell that she would not be able to be there, and of course, I do not remember if I even talked to him, I think I just talked to the girl in the outside office, and she, of course, told him.

Q. Now, you went with your mother at the time she went to the office of Campbell and Wiechert?

A. Yes, sir.

Q. Pursuant to this telegram? A. Yes.

Q. And who else was with you?

A. My husband and my mother.

Q. Now, will you just tell the jury what occurred at

that office, as nearly as you can recollect it?

When we got there Mr. Campbell was not there again, so we saw Mr. Wiechert, who seemed to have all the things prearranged, and Mr. Haun came in directly, and we went over this thing in general, I mean it was all explained, just what my mother was to do, and the papers were shown her that she probably don't remember just everything she read. I wouldn't either, and I think they were all passed around for my husband and myself to read, [fol. 581] too. But that did not seem to interest me so much, because the settling of the deal was the main object that I was there for; and then they-let's see, Mr. Haun came in, of course, he was there, then they suggested that she have this representative for the thing, which was necessary, and not knowing any attorneys outside of her own, why they suggested Mr. Felsen, and he was directly brought in by Mr. Haun, then this thing was reread aloud by Mr. Felsen.

After that, we talked about what my husband would have, the connections he had in the thing, of course, it was nothing to him really, but he was brought into it, and we talked over that.

Q. What was said about that?

A. Well, I brought up the subject myself. I said it just did not seem fair to bring someone else into it, like my husband and myself, where it was really my mother's own, her case, and her ideas and things, what to do, what she thought best. In cases like that people generally do not give their opinion because it may be wrong, and they are to blame.

So I said I could not see where it was fair to bring my husband and his job into it. A job meant a lot to anyone of our age, especially after he had the seniority he did, and Mr. Wiechert said it could be done and had been done; and we did know of case where it had been done. So then we proceeded—

The Court: Is that the exact language that he used, it could be done?

A. It could be done and it had been done, yes, sir.

The Court: Is that the exact language he used? [fol. 582] A. Yes.

Q. Now, what brought forth that remark, what was said by you or anyone else to lead up to his saying it could be

done and it had been done?

A. Well, I said it just did not seem fair, that there was no necessity, or need for my husband being brought into it, and I could not see why they could bring someone else into it, but knowing that my husband's job would be on the scale—just like the man on the jury yesterday, he was dismissed because he could not give his own opinion, it meant something, he could not express, he could not give his own ideas what it meant because it would be threatening his job.

Q. Now, had your husband as well as you and your mother discussed the possibility of his losing his job?

A. Yes, sir. That had been the main theory.

Mr. Davis: We object.

The Witness: In the thing.

Mr. Davis: Your Honor, unless there is some evidence we are responsible for it in any way. I do not think there is any evidence here we are responsible for it.

The Court: Overruled.

Mr. Davis: There is certainly nothing in Judge Howell's testimony of anything that they testified to.

Mr. Hay: There is certainly evidence here-

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted.

Mr. Hay: All right.

[fol. 583] Q. Just what had been said between your husband and your mother and yourself when you went, when you talked about the possibility of his losing the job?

A. Well, after he was brought into it by going to Mr. Howell's office, it just seemed that the main interest was centered on him then, it seemed the last remark, or something, nothing else had moved the thing or put it in their direction."

Found in Reporter's transcript of the testimony on pages 297 to 306 inclusive.

On the ground that it was and is hearsay and self-serving and there was nothing in Hamm's conversation with Mr. Howell that could possibly affect the issues in this case in any way, and on the ground that it does not attempt to prove fraud, or duress, and that witness was relating hearsay, that of what Hamm said to Howell and Howell to Hamm.

XXVI.

The said United States District-Court erred in refusing to admit in evidence testimony offered by defendant on cross-examination of plaintiff's witness, Mary Stewart, as follows:

"Q. How much have you used?

Mr. Hay: We object to that, Your Honor.

The Court: Sustained.

Mr. Davis: Your Honor, that shows ratification.

Mr. Sheppard: Let us make our offer of proof.

(Thereupon, out of the hearing of the jury, the following offer of proof was made:)

Mr. Sheppard: Defendant offers to prove by the plaintiff, who is now on the witness stand, just the amount of money which she has used of this five thousand dollars, and because defendant does not know the amount defendant requests permission to make this offer of proof by [fol. 584] questions and answers to the witness outside the hearing of the jury.

The Court: As I recall this testimony, she made a tender, and it was refused.

Mr. Sheppard: Yes, sir. No question about it.

Mr. Hay: We object to it.

The Court: Sustained.

Mr. Sheppard: Will Your Honor permit us to ask these questions and answers for the purpose of showing how much—we do not know. We can't put that in our offer. I mean out of the presence of the jury, just a proof, offer of proof.

The Court: Very well. I do not see the occasion of examining the witness out of the presence of the jury. I thought there were some questions you wanted to ask for the purpose of making your record.

Mr. Sheppard: It is to show how much she spent.

Mr. Hay: Our point is that is wholly immaterial, not in issue in this case.

Mr. Sheppard: I know it is, but our point is it is mighty material. We have a right to show how much she used and at what times.

The Court: If I sustain an objection I am not going to let you go ahead and develop the same facts after I have made a ruling.

Mr. Sheppard: I mean out of the hearing of the jury.

The Court: I don't care if it is out of the hearing of the jury or out of the hearing of the court. I do not think you are entitled to that. I do not think it is—there is tes-[fol. 585] timony here that she made a tender and that you declined it, and I do not see that you have any right to show what she has done with the money after that.

Mr. Sheppard: I understand that perfectly, but we disagree with you. I want to make our offer of proof, that is all, and we cannot state to you how much she spent, because we do not know.

Now, we want to ask her out of the presence of the jury and for the purpose of our proof, how much she spent,

and how much she has left as part of the offer of proof, that is all.

Mr. Hay: I do not see how that could possibly affect their case. If they are entitled to show this, they are entitled whether they know the amount or do not know the . amount.

Mr. Sheppard: The Court has already ruled whether we are entitled to show it. All we are asking is to get our proof in the record.

The Court: Are you objecting, Mr. Hay?

Mr. Hay: I am.

The Court: Sustained.

Found in the Reporter's transcript of the testimony on page 321 to 323 inclusive.

To which ruling of the Court, the defendant, by its counsel, then and there, at the time, duly excepted."

On the ground that the offer of proof in cross-examination would show, or tend to show that plaintiff ratified the release.

XXVII.

The said United States District Court erred in refusing to order a mistrial of said cause when the following occurred in the proceeding:

[fol. 586] "Q. Will you look at this jury, look at them, and tell us this jury on your oath, that the reason you did that was your interest in this woman? Look over and tell them.

A. It was the interest of Mrs. Steward and the Southern Railway, our mutual interest.

Q. Oh! And in the interest of Mrs. Stewart and the Southern Railway, you got Mr,—this bird over here—

Mr. Sheppard: Now, Your Honor, we object to that remark.

The Court: Sustained.

Mr. Sheppard: And ask that counsel be rebuked, and I think, Your Honor, we will move for a mistrial. That is not the first time that occurred in this record.

The Court: Overruled, proceed.

Mr. Sheppard: Exception."

On the ground that the action of plaintiff's attorney was improper and was intended and did inflame the jury.

XVIII.

The United States District Court erred in refusing to sustain defendant's motion for judgment notwithstanding the jury verdict or for a new trial. Omitting caption and signatures said motion reads:

Comes now the defendant and moves the court to set aside the verdict herein and any judgment which has been rendered pursuant thereto, and notwithsfanding said verdict, to have judgment entered for defendant in accordance with its motion for a directed verdict filed herein and presented to this court at the close of all the evidence in this case, upon each and every ground set forth in its said motion for a directed verdict.

Defendant further prays in the alternative for a new trial if the court should refuse to set aside the verdict and judgment herein and to enter judgment in accordance [fol. 587] with its motion for a directed verdict as last above prayed. As grounds for said new trial defendant states:

L

The verdict of the jury herein is not supported by any competent and legal evidence.

11.

The release executed by the plaintiff is binding upon her and there is no evidence showing that any fraud or duress entered into the execution thereof.

Ш.

The record and proceedings of the Probate Court of St. Clair County, Illinois, introduced in evidence, which disclose that plaintiff made application to such Court for authority to execute the aforesaid release and received authority so to do, together with the order of said Court retaining jurisdiction over the matter constitute a final judgment unappealed from and which cannot be collaterally attacked in the trial of this case. The judgment and action of the Probate Court are binding upon plaintiff whereby she had and has no authority or right to attack in this action the release pleaded in bar hereof.

IV.

The court erred in admitting incompetent, irrelevant, improper and prejudicial evidence offered by plaintiff and objected to by defendant.

V.

The court erred in refusing to admit competent, relevant and material evidence offered by defendant.

[fol. 588]

The verdict by the jury is excessive and so excessive as to indicate that it resulted from passion and prejudice on the part of the jury against defendant.

VII.

The verdict of the jury is so indefinite as to be a nullity; for the reason that it cannot be determined whether the intention of the jury was to render a verdict in favor of plaintiff for the sum of \$17,500.00 less the sum of \$5000.00 which plaintiff had already received from defendant; or whether the verdict was to be in the sum of \$17,500.00, exclusive of the \$5,000.00 payment which had already been made by defendant to plaintiff.

VIII.

The Court's charge to the jury is erroneous in each and every particular pointed out by defendant and included in defendant's objections and exceptions to the charge, made at the close of its delivery by the court and before the jury retired to consider its verdict. Each objection and exception to said charge is separately assigned as error.

The court erred in failing and refusing to give to the jury each and all of the instructions on the merits, requested by defendant at the close of all the evidence marked Instructions A to U, both inclusive; for the reasons assigned by defendant to the Court's refusal to give said instructions, immediately subsequent to the court's charge to the jury herein. The refusal of each of said instructions is separately assigned as error.

X.

The court erred in overruling and denying defendant's motion for a directed verdict offered at the close of and [fol. 589] of its evidence in the case.

XI.

There is no substantial evidence in this case proving or tending to prove that the defendant was guilty of a violation of the Safety Appliance Statute of the United States as alleged in the petition.

On the grounds,

- No. 1. That there was and is no substantial evidence adduced in this case showing, or tending to show that defendant herein was, or is guilty of actional negligence, or want of duty charged in the petition.
- No. 2. There was and is no substantial evidence adduced in this case that any actionable negligence, or want of duty whatever of defendant was or is the direct and proximate cause of the fatal injuries received by plain-stiff's intestate as charged in the petition.
- No. 3. There was and is no substantial evidence whatever in this case showing, or tending to show any violation of any duty as charged in the petition.
- No. 4. That plaintiff can not recover in this case because all the substantial evidence herein unequivocably shows that plaintiff, as administratrix, petitioned the Probate Court of St. Clair County, Illinois, to settle her claim against defendant, as such administratrix, for Five Thousand Dollars, and that upon her petition the order was granted and that she settled and released her claim as

such administratrix for Five Thousand Dollars, and the said Five Thousand Dollars was paid her as such administratrix, and that she received and accepted the same in settlement thereof, and that thereafter she filed a petition in said Probate Court to set aside the settlement, which the said Probate Court denied; and that this cause is a collateral attack on the said orders and judgment of the [fol. 590] Probate Court of St. Clair County, Illinois, of which matters said Probate Court had full jurisdiction.

- No. 5. That there was and is no substantial evidence in this case showing, or tending to show that the defendant, its servants or agents was or is guilty of any actionable negligence or fraud whatever.
- No. 6. That there was and is no substantial evidence in this case showing, or tending to show that defendant was or is guilty of any actionable duress whatever.
- No. 7. That there was and is no substantial evidence in this case impeaching, or intending to impeach the execution by plaintiff of the release in evidence in this case.
- No. 8. That there was and is no substantial evidence in this case showing, or tending to show any fraud, or duress whatever in the execution of the release, or that plaintiff at the time she executed the release did not know that she was executing a full release discharging defendant from all claims.

ARNOT L. SHEPPARD,
WALTER N. DAVIS,
WILDER LUCAS,
Attorneys for Appellant Defendant.

Copy of above received this Sept. 20, 1939.

CHAS. P. NOELL, HAY & FLANAGAN, Attorneys for Plaintiff.

[fol. 591] (Designation of Matters to be included in Transcript on Appeal.)

(Filed September 20, 1939.)

The clerk will include in the transcript of the appeal in the above entitled cause the following:

- 1. Plaintiff's petition filed, the date thereof, the summons and showing date returnable.
 - 2. Marshal's return to summons, and date of return.
- 3. Defendant's second amended answer to plaintiff's petition filed and date of filing.
- 4. Plaintiff's reply filed to defendant's second amended answer and date of filing.
- 5. Order and entries of record showing trial of said cause on June 8, 9, 10, 11, 12 and 13, 1939. Submission of cause to jury, verdict of jury, and the judgment of June 13, 1939 appealed from, all at the March Term, 1939 of said District Court.
- 6. Defendant's motion for a new trial filed or motion for judgment notwithstanding verdict and date of filing.
- 7. Entry of record showing defendant's motion for judgment notwithstanding the verdict or for motion for a new trial submitted to court and the date thereof.
- 8. Order of District Court showing motion for judg-[fol. 592] ment notwithstanding the verdict or motion for a new trial overruled and the date same was overruled.
- 9. Defendant's notice of appeal filed and the date of the filing.
- 10. Supersedeas bend filed, the date filed and the order of court approving bond and date approved.
- 11. Record entry and date thereof showing defendant filed two copies of evidence and proceedings stenographically reported in District Court.
- 12. Defendant's transcript of the evidence and proceedings, the date of filing and service upon plaintiff or his attorneys.

- 13. Defendant's statement of points filed in District Court, record entry and date thereof.
- 14. Defendant's designation of contents of record on appeal and date of filing same.
- 15. The praccipe of May 26, 1939 for subpoena for Henry Hamm filed and issued.
- 16. The District Court's order of June 22, 1939 entered staying execution of judgment until ten days after overruling defendant's motion for judgment notwithstanding the verdict or motion for a new trial.
- 17. The District Court's order of June 24, 1939 amending order of June 22, 1939 granting defendant a stay of execution on judgment until the expiration of thirty days after the ruling of the court on defendant's motion for judgment notwithstanding the verdict or for a new trial in the event said motion is ruled upon adversely to defendant.
- 18. Order of court of June 9, 1939 overruling defendant's motion for a directed verdict at the close of plaintiff's case.
- 19. Order of June 19, 1939 overruling motion of defendant for directed verdict at the close of the entire case [fol. 593] and evidence.

Defendant desires said transcript for the clerk of the Circuit Court of Appeals and elects that the record in this cause be printed under the supervision of the clerk of said Court of Appeals.

ARNOT L. SHEPPARD, WILDER LUCAS, WALTER N. DAVIS,

Attorneys for Defendant.

[fol. 594]

Clerk's Certificate.

United States of America,

Eastern Division of the Eastern

Judicial District of Missouri—ss.:

I, Jas. J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the designation of the contents of record to be included in the transcript of record on appeal heretofore set out) of the record and proceedings in case No. 12154, Law, wherein Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased is plaintiff and Southern Railway Company, a corporation, is defendant, as fully as the same remains on file and of record in my office.

Seal II. S. District Court East, Div. of the East. Judic. Dist. of Missouri

In Testimony Whereof, I have hereunto subscribed by name and affixed the seal of said Court at office in the City of St. Louis, in said Division of said District this 28th day of October, in the year of our Lord, Nineteen Hundred and Thirty-nine.

> JAS. J. O'CONNOR. Clerk of said Court. By C. E. Rudolph,

Deputy.

Filed Oct. 28, 1939, E. E. Koch, Clerk.

[fol. 400] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals Eighth Cicuit

Southern Railway Company, a corporation, Appellant, No. 11,609. vs.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased.

The Clerk will enter my appearance as Counsel for the Appellant.

WILDER LUCAS, ARNOT L. SHEPPARD, WALTER N. DAVIS,

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 28, 1939.

(Appearance of Mr. Charles M. Hay and Mr. Stewart D. Flanagan as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

CHAS. M. HAY, STEWART D. FLANAGAN.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 31, 1939.

[fol. 401] (Appearance of Mr. Charles P. Noell as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

CHAS. P. NOELL.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 1, 1939.

(Order of Submission.)

United States Circuit Court of Appeals Eighth Circuit

March Term, 1940.

Friday, March 15, 1940.

Before Judges Sanborn, Thomas and Van Valkenburgh.

No. 11,609. vs.
Mary Stewart, Administratrix, etc.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This tause having been called for hearing in its regular order, the same was argued by Mr. Walter N. Davis and Mr. Arnet L. Sheppard for appellant, and by Mr. Charles M. Hay for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 402] (Order as to Substitution of Party Appellee.)
United States Circuit Court of Appeals
Eighth Circuit

May Term, 1940. Wednesday, July 24, 1940.

Southern Railway Company, Appellant, No. 11,609. vs.

Mary Stewart, Administratrix of the Estate of John R. Stewart, deceased.

Appeal from the District Court of the United States for the Eastern District of Missouri.

A suggestion of death of the appellee in this cause was filed by counsel for appellant July 13, 1940, and on July 22, 1940, counsel for the respective parties filed a stipulation that Clarence A. Stewart, Administrator of the Estate of John R. Stewart, deceased, may be substituted as

appellee in lieu and instead of the appellee, Mary Stewart, Administratrix of the Estate of John B. Stewart, deceased, who died on the 8th day of July, 1940.

Accordingly, It is Ordered by this Court that said substitution of party appellee in this cause be, and is hereby, made.

July 24, 1940.

[fol. 403]

(Opinion.)

United States Circuit Court of Appeals Eighth Circuit.

No. 11,609.—OCTOBER TERM, A. D. 1940.

Southern Railway Company, a corporation,

Appellant

V

Clarence A. Stewart, Administrator of the estate of John R. Stewart, deceased,

Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

[November 1, 1940.]

Mr. Walter N. Davis and Mr. Arnot L. Sheppard (Mr. Wilder Lucas on the brief) for appellant.

Mr. Charles M. Hay (Mr. Charles P. Noell on the brief) for appellee.

Before Sanborn, Thomas and Van Valkenburgh, Circuit.
Judges.

VAN VALHENBURGH, Circuit Judge, delivered the opinion of the court.

John R. Stewart, the deceased, was a switchman in the employ of appellant. February 12, 1937, he was engaged at East St. Louis, Illinois, in coupling up certain cars on track No. 12 in appellant's yards. Several of said cars contained goods which were en route in interstate commerce from various states of the United States to various other states of the United States. While engaged in such duties, Stewart's arm was crushed by impact between the couplers of two cars of the train. It was charged by appellee that he died on February 14, 1937 as a result of such injury.

The suit is based upon an alleged violation of the Safety Appliance Act, (Sec. 2 Act of March 2, 1893, C. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2, 1903, 32 Stat. 943, C. 976), and is brought under the Federal Employers' Liability Act, (45 U.S.C.A. Sec. 51).

Mary Stewart, plaintiff below, and the original appellee in this court, was the wife of deceased, and brought this suit April 20, 1937, to recover damages for the alleged wrongful death of the deceased as an employee of the appellant railroad, and also for his conscious pain and suffering proximately caused by the alleged violation by said appellant of the provisions of the Federal Safety Appliance Act, in furnishing on its line any car "used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars".

After the filing of the suit Mr. H. B. Haun, assistant general claim agent of the appellant Southern Railway Company, made a number of attempts, by personal contact and through others, at his request, to enter into negotiations for the settlement of this cause; and, during this period, amounts in settlement from \$1,000 to \$5,000 were tentatively offered to Mrs. Stewart, but not accepted. Finally, according to the testimony of Haun, he learned

that one Henry Hamm, the husband of a daughter of plaintiff, was, by his opposition, blocking the settlement. Hamm at that time was a switchman in the employ of the Terminal Railroad Association, which is owned by sixteen proprietary lines, of which appellant herein is one. The Terminal Association therefore readily accedes to all proper requests of the individual carriers. Mr. Haun testifies that when he learned of Mr. Hamm's attitude he called on Mr. J. L. Howell (now deceased), attorney for the Terminal Association, with offices at the Union Station in St. Louis, Missouri. To Mr. Howell, Haun testifies he said; "Mr. Howell, we oftentimes have cases where we have our own employees who are blocking these settlements. Here we have a case where we know that is what has happened, and I wish you would talk to Mr. Hamm about it". Mr. Howell then called up the east side office of the Southern Railway, where Hamm was employed, and requested that "they have Bill Hamm come in and see me at his first opportunity". When Hamm came in Howell referred to the death of the deceased, and the claim of the widow and said:

"They are offering to pay her five thousand dollars clear and she is willing to take it, but they say that you are standing in the way."

'Yes', he said, 'I am, because I don't want that woman gypped out of what money she gets.'

I said, 'How about the five thousand dollars?'

He said, 'That is the reason; that is all right to settle for that, if she gets the five thousand dollars.'

I said, 'What would it take to convince you that she would get the five thousand dollars?'

'Well', he said, 'I want it put in writing.'

'Well, now', I said, 'they can't do that. Railroads don't do that, put things in writing like that. It is not right. If the Southern tells you that they will pay your mother-in-law five thousand dollars clear, you can depend on what they tell you.'

Well, he didn't know whether he could or not. I said, 'You know Bruce Campbell, don't you?'

He said, 'Yes, I do'.

I said, 'If Bruce Campbell tells you that they will see that your mother-in-law gets five thousand dollars clear, and they stand all other expense, would you not believe him?'

'Well', he said, 'I would rather it would be put in writing.'

I said, 'Would you believe me if I would tell you right now?'

'Yes, if you tell me that I will believe it.'

I said, 'Mr. Campbell will tell you the same thing'.

He said, 'If he will do that, that is all right.'

I turned around to my desk and called Bruce Campbell. I talked with Bruce Campbell and stated, in Mr. Hamm's presence, re-stated what I had already stated.

Mr. Campbell says, 'That is correct.' He said, 'Is Hamm there?'

I said, 'Hamm is right here now, listening, and Hamm says it is all right, that he thinks five thousand dollars is a reasonable settlement, if she gets that much money, and I have myself guaranteed him that she will get that, if you say so.'

He says, 'Why not have him come right up here?'

I said, 'That would be fine.'

I said to Hamm, 'Hamm, can you go right up to Mr. Campbell's office?'

He said, 'Sure'.

I said, 'Hop on a car.'

'Go on, Hamm, and whatever Bruce Campbell tells you I will guarantee', and he went out of the office. He said good-bye, shook hands, and away he went. That was the whole conversation.

At that time I was under the impression that it was an accident, and they were settling it up. I knew nothing more about it, or heard nothing more about it, until Mr. Noell called me up on the telephone and had a conversation about the suit. I said I didn't know there was a suit. I think the next morning I saw in the paper that there had been a suit filed".

On November 30, 1937, there was a meeting in the office of Kramer, Campbell, Costello & Wiechert, attorneys for appellant, for the purpose of effecting a settlement with Mrs. Stewart on account of the death of her husband. Those present were Mr. Wiechert, attorney for appellant, Mary Stewart, widow of deceased, her daughter, Mrs. Henry Hamm, and her husband Henry Hamm. It appears in the testimony that Mrs. Stewart had not previously agreed to this settlement, but did so finally, whereupon Wiechert, Mrs. Stewart, and Mr. and Mrs. Hamm repaired to the Probate Court of St. Clair County, Illinois, at Belleville, in which court the administration of the estate of John R. Stewart, deceased, was pending. The petition of Mrs. Stewart for leave to settle the case against appellant and relieve the latter from further liability in the premises, was filed. The amount of the settlement consisted of \$5,150.00, which included an attorney's fee of \$150.00, which was paid to a Mr. Felsen, an attorney called in by Mr. Wiechert to represent Mrs. Stewart, instead of Mr. Noell, her attorney who filed the suit. The Probate Court, on that day, made its order approving said settlement. At a later date Mrs. Stewart filed in the said Probate Court a petition to set aside the previous order of that court authorizing and approving said settlement of November 30, 1937, alleging that the papers signed by her, praying for authority to settle, were signed as a result of fraud and duress on the part of appellant, and its agents and attorneys. After hearing in the Probate Court, her motion to set aside the approval of said settlement was Subsequently, at the trial of this cause in the District Court, Mrs. Stewart testified that she was induced by fraud and duress to file the petition and procure the order of compromise in the Probate Court because of her . fear, induced, in part at least, by a statement of Mr. Wiechert which she took to mean that if she declined to do so, her son-in-law Hamm might lose his position with the Terminal Railroad Association, in which case it would be difficult, if not impossible, to secure other employment, and his wife, Mrs. Stewart's daughter, and their children, would be reduced to privation and suffering thereby. The testimony of her daughter, Mrs. Hamm, corroborated that of Mrs. Stewart. At this point the offer of appellant to introduce evidence of the alleged compromise and that its setting aside was rejected by the Probate Court, was denied upon objection by counsel for appellee.

The case was duly tried in the district court, notwithstanding said purported settlement, and the jury returned a verdict in favor of appellee in the sum of \$17,500. Hamm did not testify at the trial. From the judgment entered upon that finding this appeal is taken. After the submission thereof, the death of Mary Stewart, administratrix, was duly suggested, and, pursuant to stipulation of counsel, Clarence A. Stewart, as administrator of the estate of John R. Stewart, deceased, was substituted as appellee.

- 1. The first point urged by appellant in its brief and argument is that the court erred in denying appellant's motion for a directed verdict because, (a) the record contains no evidence that the deceased attempted to open the coupler knuckles by using the pin-lifter, an appliance provided to operate the automatic coupler, and (b) because the record contains no evidence that an inefficient coupler was the proximate cause of decedent's injury.
- 2. The next following points and authorities concern the error assigned because of the action of the trial court in disregarding, and, in effect, setting aside the action of the Probate Court in allowing the compromise settlement referred to, and in refusing to set the same aside.

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3. It is insisted that neither fraud nor duress may be predicated on the facts and circumstances in evidence.

- 4. Error is assigned to a part of the court's charge that, in the absence of evidence that Stewart did not use the pin-lifter, the law presumes that he did use it before going between the ends of the cars.
- 1. With respect to this first specification of error relied upon, of course it must be recognized that the sole charge of breach of duty against defendant-appellant, is that it furnished the car or cars, here concerned, equipped with couplers not of statutory requirement. It is only because of its bearing upon this charge that evidence concerning the condition of the pin-lifter there in attendance, and its use, or disuse, by the deceased, is relevant. Direct evidence upon these crucial points is lacking. The absence of such sufficiently direct testimony was apparently recognized by the court, and inspired the adding of the following paragraph to its charge:

"You are instructed that it was the duty of deceased, in the performance of his work, be ore going between the cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, extending on the outside of the car, and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars, if you find he did go between the ends of the cars".

The only parts of the record that could bear upon the condition of the pin-lifter is the testimony of the witness Stogner, especially that found upon pages 29, 31, 34, 36 and 40 of the transcript. The Supreme Court has held that the statute must be liberally construed so as to give a right of recovery for every injury the proximate cause of which was failure to comply with the Act. The jury may not be permitted to speculate as to the cause of the injury, and "the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused

by the negligent act of the employer". Atchison, Topeka & Santa Fe Ry. Co. v. Toops, 281 U.S. 351, 354, 355. We are asked to declare that, on the record before us, the motions of appellant for a directed verdict and for a verdict in its favor non obstante verdicto should have been sustained; but in view of that record we cannot say that the inference might not reasonably have been drawn by the triers of the fact that there was probable cause to believe that the injury suffered was caused by the breach of duty charged. As hereafter shown the court's charge, to which exception is urged, was erroneous, and necessarily potentially prejudicial.

2. The main contention of appellant that the trial court erred in refusing to recognize the order and judgment of the Probate Court of St. Clair County, Illinois, is based upon the insistence that the action of the wife of the deceased to recover for the death of her husband, especially his pain and suffering, was an asset of decedent's estate of which the Probate Court had jurisdiction; and that its orders and judgments cannot be attacked collaterally in the federal trial court. The argument of appellee that the Probate Court had no jurisdiction over the claim of appellant is based upon the consideration that,

"Where, as here, the death action is one under the Federal Employers' Liability Act, it is governed exclusively by the federal law. The personal representative does not sue by his inherent right as representative of the estate of the decedent, but by virtue of statutory designation and as trustee for the person or persons on whose behalf the act authorizes recovery. And the recovery is not for the benefit of the estate, is not an asset thereof, but is for the personal benefit of the beneficiary or beneficiaries designoted by the statute".

Chicago, Burlington & Quincy R. Co. v. Wells-Dickey Trust Co., 275 U.S. 161, l.c. 163; Taylor v. Taylor, 232 U.S. 363; Mann v. Minnesota Electric Light & Power Co., 10 Cir., 43 F.2d 36; American Car & Foundry Co. v. Anderson, 8 Cir., 211 F. 301, 308. The widow was not compelled by law to apply to the Probate Court for authority respecting the compromise of this case, and we think the action of the trial court in rejecting the evidence of approval by the Probate Court of the compromise settlement was justified.

- The testimony that the acts of the attorneys and claim agent of the appellant constituted a threat to deprive the son-in-law of Mrs. Stewart of his job with the Terminal Association was not strongly in support of the charge of fraud and duress. Nevertheless, it disclosed dreumstances which may well have impressed the jury with their impropriety in consideration of the relationship of the various parties concerned. It is to be noted that the entire defense of the appellant was conducted by attorneys for the Terminal, and that the settlement of the suit was initiated by the Terminal attorney. The attorney who filed the suit was not consulted with respect to the settlement. Counsel for appellant insist that "neither fraud nor duress may be predicated on the facts and circumstances in evidence". But we think they meet the requirements of the charge, as heretofore declared by this court in Winget v. Rockwood, 69 F.2d 326, 330:
- which the victim must comply at the peril of being remediless for a wrong done, and no general rule as to the sufficiency of facts to produce duress. The question in each case is whether the person so acted upon, by threats of the person claiming the benefit of the contract, was bereft of the quality of mind essential to the making of a contract, and whether the contract was thereby obtained. In other words, duress is not to be tested by the character of the threats, but rather by the effect produced thereby on the mind of the victim. The means used, the age, sex, state of health and mental characteristics of the victim are all evidentiary, but the ultimate fact in issue is whether such person was bereft of the free exercise of his will power.

The trend of modern authority is to the effect that a contract obtained by so oppressing a person by threats as to

deprive him of the free exercise of will, may be voided on the ground of duress. What constitutes duress is a matter of law; whether duress exists in a particular transaction is usually a matter of fact":

We think that, at least, this point should be left to the consideration of a jury.

4. The charge of the court to which an express specification of objection is preserved is, as has been said, erroneous for the reason that it is inconsistent with the burden of proof imposed by law upon a plaintiff. The Supreme Court has settled this question, as we think, finally and conclusively.

"In an action for damages for personal injuries while the defendant has the burden of proof of contributory negligence, the plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff. There is equally a presumption that the defendant performed his duty.

A plaintiff in the first instance must show negligence on the part of the defendant. ••• The negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

Looney v. Metropolitan Railroad Co., 200 U.S. 480, 487, 488.

The errors assigned have been fully considered and the conclusion is that the judgment below must be reversed and remanded for a new trial in conformity with the views herein expressed. It is so ordered.

[fol. 414]

(Judgment.)

United States Circuit Court of Appeals Eighth Circuit

October Term, 1940.

Friday, November 1, 1940.

Southern Railway Company, a Corporation, Appellant, No. 11,609. vs.

Clarence A. Stewart, administrator of the Estate of John B. Stewart, deceased.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Southern Railway Company, a Corporation, have and recover against Clarence A. Stewart, Administrator of the Estate of John B. Stewart, deceased, the sum of Dollars for its costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause be, and the same is hereby remanded to the said District Court for a new trial in conformity with the opinion of this Court filed herein November 1, 1940.

November 1, 1940.





United States Circuit Court of Appeals, EIGHTH CIRCUIT.

OCTOBER TERM, A. D. 1940.

SOUTHERN RAILWAY COMPANY. a Corporation.

Appellant.

CLARENCE A. STEWART. Administrator of the Estate of John R. Stewart, Deceased.

Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLANT'S MOTION FOR A REHEARING

Comes now the Southern Railway Company, a corporation, the appellant in the above-entitled cause, and respectfully moves this Court to set aside its opinion and judgment in the above-entitled cause herein rendered on November 1, 1940, and to grant appellant a rehearing of this cause, and for grounds of this motion respectfully states that questions decisive of this cause and duly submitted by appellant were inadvertently overlooked by this Court, and that the decision of this Court is in conflict with the controlling decisions of the United States Supreme Court, and that this Court has erred in its opinion and judgment, as appellant respectfully submits, in the respects following:

I.

In its brief and argument on the hearing appellant urged that the trial court erred in denying appellant's motion for a directed verdict and in denying appellant's motion for judgment non obstante veredicto, because (a) the record contains no evidence that the deceased attempted to open the coupler knuckles by using the pin lifter, an appliance provided to operate the automatic coupler, and (b) because the record contains no evidence that an inefficient coupler was the proximate cause of decedent's injury. We respectfully urge that this Court erred in overruling appellant's contentions as above set forth.

In its opinion this Court say:

"The only parts of the record that could bear upon the condition of the pin lifter is the testimony of the witness Stogner, especially that found on pages 29, 31, 34, 36 and 40 of the transcript. The Supreme Court has held that the statute must be liberally construed so as to give a right of recovery for every injury, the proximate cause of which was failure to comply with the Act. The jury may not be permitted to speculate as to the cause of the injury, and 'the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer.' Atchison, Topeka and Santa Fe Railway Co. v. Toops, 281 U. S. 351, 354, 355. We are asked to declare that, on the record before us, the motions of appellant for a directed verdict and for a verdict in its favor non obstante veredicto should have been sustained; but in view of the record we cannot say that the inference might not reasonably have been drawn by the triers of the fact that there was probable cause to believe that the injury suffered was caused by the breach of duty charged."

In quoting from Looney v. Metropolitan Railroad Co., 200 U. S. 480, 487, 488, the Court say:

"A plaintiff in the first instance must show negligence on the part of the defendant. But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

We respectfully submit that this Court erred in holding from the record that the triers of the fact might reasonably draw an inference that there was probable cause to believe that the injury suffered was caused by a breach of the duty charged.

Witness Martin, the engineer, saw Stewart immediately before and at the time Stewart went between the cars. On direct examination by appellee he said that he looked out all the time for signals, but he did not notice Stewart use the pin lifter before he went in there (between the cars). He was watching for a signal all the time (R. 46). Before Stewart went between the cars he saw Stewart give him a signal. There was no obstruction between Stewart and the engineer when Stewart gave him the stop signal and went between the cars (R. 47). The condition of the visibility was pretty clear (R. 48). Stewart signaled by hand and the engineer could see his hand (R. 49).

In this opinion the Court say, in substance, that appellee's case depends wholly on an inference. This inference is and necessarily must be an inference that Stewart attempted by means of pin lifter to open the knuckle and it would not open the knuckle. This inference, we think, becomes dissipated in the face of the positive evidence that Martin was watching for a signal and did not notice Stewart use the pin lifter before he went between the cars. The rule of law is here applicable that when evidence comes in the door inferences fly out the window. How may the jury be permitted to say that he did use the pin lifter in the face of the evidence that a man in position to see and looking at him and watching for a signal did not notice him use the pin lifter?

In this opinion the Court has ruled that appellee's case depends upon an inference. It is the enunciated rule of the United States Supreme Court that even though an inference arises from plaintiff's evidence that, uncontradicted, invests him with a prima facie case, yet, where his prima facie case depends upon an inference, it becomes dissipated upon the advent of uncontradicted, unimpeached evidence showing affirmatively to the contrary, even though the uncontradicted and unimpeached evidence is introduced by defendant.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;

So. Ry. Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239.

Again, where the evidence is so overwhelming as to leave no room for doubt what the fact is, the trial court should direct a verdict. The evidence is overwhelming that Stewart did not use or attempt to use the pin lifter. The sole and only evidence in that regard was introduced by plaintiff; and that evidence, in our opinion, conclusively demonstrates, by the man who was looking directly at him and watching for a signal, that Stewart did not use or attempt to use the pin lifter.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720;

Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361;

Small v. Lamborn & Co., 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597;

N. & W. R. Co. v. Hall, 49 Fed. (2d) 692.

Insubstantial and insufficient testimony does not require the submission of an issue to the jury.

So. Ry. Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239;

A. T. & S. F. R. Co. v. Toops, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896.

Where there are several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which he alone would be entitled to recover. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;

Gulf etc. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370;

N. Y. C. R. Co. v. Ambrose, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562;

Stevens v. The White City, 285 U. S. 195, 52 S. Ct. 347, 76 L. Ed. 699,

Now just what would the jury be justified in believing, under the evidence, that Stewart did to justify a verdict in favor of appellee? Would the jury be justified in finding that Stewart used or attempted to use the pin lifter to open the knuckle to couple the cars by impact? The jury would have to so find before they could find for appellee

and how could they be permitted to so find in the face of evidence that he did not use or attempt to use the pin lifter. Even if we admit that an inference arises from the evidence favorable to appellee, yet if that is true, undoubtedly several inferences arise from the facts of equal force at least with the inference favorable to appellee, and we think of greater force. If there is an inference that arises that he did use the pin lifter, under the evidence that inference is weak; and from the engineer's testimony a stronger inference arises, we think conclusive, that he did not use the pin lifter, the appliance provided to permit the couplers to couple automatically by impact without the necessity, of men going between the ends of the cars. If he did not use or attempt to use the pin lifter, then the coupler safety appliance could not have been the proximate cause of his injury.

Did or did not Stewart use or attempt to use the pin lifter? Even though we could say an inference arose, weak in character as it would be, yet with the evidence of the engineer in the record that he did not notice Stewart use, the pin lifter, such evidence would permit the jury to speculate wildly to be permitted to find that Stewart used or attempted to use the pin lifter. The United States Supreme Court has never recognized the scintilla rule. However, we do not think the evidence herein even justifies the application of the scintilla rule.

This Court holds that a plaintiff in the first instance must show negligence on the part of the defendant, but that the negligence of a defendant cannot be inferred from a presumption of care on the part of a plaintiff. If defendant's negligence cannot be inferred from the presumption of care on plaintiff's part, then in this case, we submit, no inference of negligence arises, especially since the engineer, who was observing Stewart, did not see Stewart use or attempt to use the pin lifter before going between

the cars, for the United States Supreme Court says that, under such circumstances, negligence must be shown by direct evidence.

In its opinion this Court says, quoting from Looney v. Metropolitan R. Co., 200 U. S. 480, 487, 488, that "One presumption cannot be built upon another." Of course, as has been held many times, this also refers to inferences. Consequently, for appellee herein to recover, the trier of the facts would have to infer that Stewart used or attempted to use the pin lifter to open the knuckle and then base on that inference the further inference that the knuckle would not open so as to permit the cars to couple.

We respectfully submit that this Court erred in failing to sustain appellant's contention as submitted and overlooked by this Court.

II. . ->

In its brief and argument, for a second point, appellant urged that the trial court erred in denying appellant's motion for a directed verdict and in denying appellant's motion for judgment non obstante veredicto because of the action of the trial court in disregarding, and, in effect, setting aside the action of the Probate Court, in allowing the compromise settlement referred to, and in refusing to set the same aside.

We again refer to our argument in our brief on this subject and again submit it to the consideration of the Court.

It is a well-recognized principle that the federal courts recognize and enforce the orders, judgments and decrees of the probate courts of a state.

Williams v. Benedict, 8 How. 11, 112; Veach v. Rice, 131 U. S. 293, 314; Christianson v. King County, 239 U. S. 356, 372, 373; O'Connor v. Stanley, 54 Fed. (2d) 20, 24, 26.

We think that as the Federal Employers' Liability Act statute expressly gave to the administrator the right of action and as the administrator must receive his appointment from a state probate court, the statute contemplates that the orderly procedure of the Probate Court should be followed. While it is true that the recovery is for the benefit of the beneficiary or beneficiaries designated by the statute, yet the Probate Court does have jurisdiction and administers the estate pro tanto and that jurisdiction is plenary. We agree that the action is governed exclusively by the federal law, but we submit that the federal law gave jurisdiction to the State Probate Court and that jurisdiction within its scope is as plenary as the jurisdiction given a state circuit court to try a Federal Employers' Liability Act case and enter a valid, binding and collectable judgment. Thus as a probate court's approval of a settlement in an ordinary case is binding until legally set aside, so it follows, we think, that a probate court's order of settlement in a Federal Employers' Liability Act case is within its jurisdiction and binding until set aside. Furthermore the Probate Court had jurisdiction of the subject matter and of the parties, and its judgment is final, conclusive and binding until set aside on appeal. The administratrix herself invoked the jurisdiction of the Probate Court, and is estopped to deny that jurisdiction. It is immaterial whether the judgment of the Probate Court is erroneous. It is binding until set aside and cannot be contested here. The remedy, if any, was by appeal. We respectfully submit that in its opinion this Court erred in that regard.

ш.

The third point urged by appellant in its brief and argument, is that the trial court erred in denying appellant's motion for a directed verdict because neither fraud nor

duress may be predicated on the facts and circumstances in evidence.

We again call this Court's attention to our brief heretofore filed in this court in this cause.

In its opinion in this case this Court said:

"The testimony that the acts of the attorneys and claim agent of the appellant constituted a threat to deprive the son-in-law of Mrs. Stewart of his job with the Terminal Association was not strongly in support of the charge of fraud and duress."

This Court says that the testimony was not strongly in support of the charge of fraud and duress. The testimony of appellant was overwhelming that no fraud or duress obtained. A judgment permitted to stand on such testimony would shock the conscience. It is a rule of law enunciated by the United States Supreme Court that where the evidence is so overwhelming on one side as to leave no room for doubt what the fact is, the trial court should sustain a motion for a directed verdict. The testimony of appellee and his witnesses is vague, inconclusive and uncertain. That of appellant is strong, cogent, clear and convincing that no fraud or duress obtained. This is a case in which this Court on that subject may very properly apply the rule of overwhelming evidence as shown by the cases following:

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 291, 77 L. Ed. 819;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720:

Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361;

Small v. Lamborn & Co., 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597;

N. & W. R. Co. v. Hall, 49 Fed. (2d) 692.

We again respectfully ask the Court to reconsider the questions above raised. We ask the Court to reconsider said questions because we sincerely feel aggrieved with the rulings of the Court on the motion for a directed verdict.

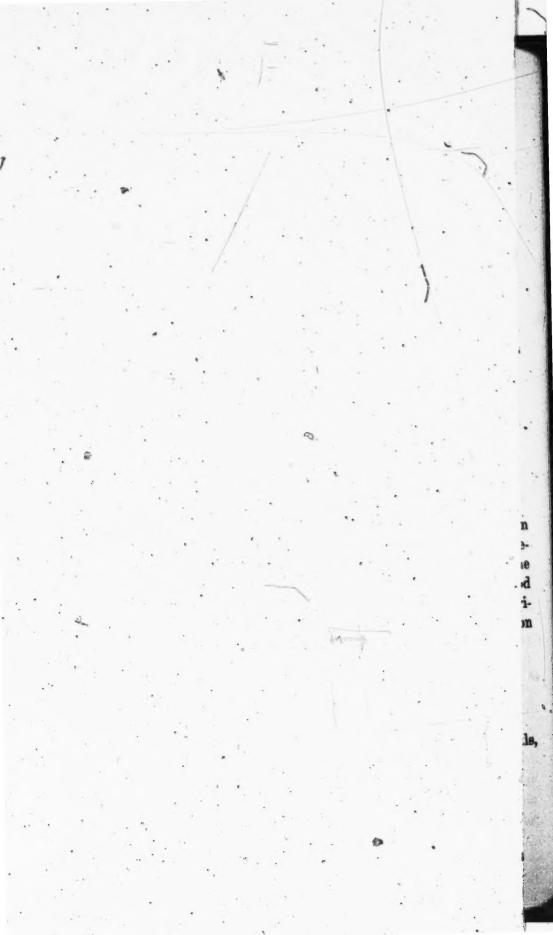
We further ask, if this petition is granted, that the judgment of the District Court be reversed, with directions to sustain appellant's motion for judgment non obstante veredicto and directing the District Court to enter judgment thereon in favor of appellant, in bar of appellee's action, and for costs.

WILDER LUCAS, ARNOT L. SHEPPARD, WALTER N. DAVIS, Attorneys for Appellant.

We, the undersigned, counsel of record for Southern Railway Company, the petitioner in the above and foregoing petition for rehearing, do hereby certify that the above and foregoing petition for rehearing is filed in good faith and is believed by us, and each of us, to be meritorious; and that same is not filed for the purpose of vexation or delay.

Wilder Lucas, Arnot L. Sheppard, Walter N. Dayis.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 15, 1940.



United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

NO. 11,609.

Civil.

SOUTHERN RAILWAY COMPANY. a Corporation, Appellant,

72.

CLARENCE A. STEWART, Administrator of the Estate of JOHN R. STEWART, Deceased, Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLEE'S PETITION FOR A REHEARING.

Comes now appellee in the above-entitled cause and files this, his petition for a rehearing of said cause, and prays that the Court grant appellee a rehearing of said cause, and as grounds for his said petition states that the Court, in its opinion herein, has inadvertently overlooked material matters of law and fact, as shown by its opinion, as follows:

This Honorable Court, in its opinion herein, has ruled and held that the following portion of the trial court's charge to the jury is erroneous and prejudicial, namely:

"You are instructed that it was the duty of deceased, in the performance of his work, before going between the cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, extending on the outside of the car, and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars, if you find he did go between the ends of the cars."

The Court has held that this portion of the charge is prejudicially erroneous because alone of the inclusion therein of the words emphasized above; and because thereof this Honorable Court has ordered and adjudged that the judgment below be reversed and the cause remanded for a new trial.

Appellee respectfully submits that, in so ruling and holding, this Honorable Court has inadvertently overlooked material, vital matters of law and fact, decisive of this phase of the case. The Court in its opinion, on page 13 thereof, holds that this portion of the trial court's charge is erroneous "for the reason that it is inconsistent with the burden of proof imposed by law upon a plaintiff." And in this connection the Court quotes from the opinion of the Supreme Court in Looney v. Metropolitan R. Co., 200 U. S. 480, 487, 488, where, in an action for death, there was no substantial evidence that the deceased employee came to his death through any negligence on the part of the defendant, and the Court, in considering whether the plaintiff had made a prima facie case, made the axiomatic statement that "negligence of defendant will not be inferred from the mere fact that the injury occurred, or

from the presumption of care on the part of the plaintiff"; saying, also, that "a presumption in the performance of duty attends the defendant as well as the person killed." In so holding, and in quoting from the Looney case, this Honorable Court, appellee respectfully submits, has, for one thing, inadvertently overlooked the fact that this criticised portion of the charge below did not relate at all to the burden of proof, nor was it so drawn as to give the jury the impression that a breach of duty on the part of the defendant could be inferred from a presumption that the deceased used the pin lifter before going between the cars.

In that portion of the charge quoted above, the Court began by referring to the duty which the Court considered was spon the deceased to try to use the pin lifter, that is, to give the appliance a proper trial, before going between the cars. It was not necessary for the Court in its charge to advert to that matter at all. The charge would have been proper and complete had all reference thereto been omitted. In Lovett v. Kansas City Terminal Railway Co., 316 Mo. 1246, an instruction was attacked for failure to require the jury to find that "the plaintiff gave the automatic appliance a proper trial," but the Supreme Court of Missouri, in upholding the instruction, said:

"The ultimate fact that was to be submitted to the jury for their finding was that the car was not equipped with a coupler which could be uncoupled without the necessity of men going between the cars' and that the instruction did."

In the instant case the Court, by its charge, explicitly and repeatedly required the jury to find, as a predicate of liability, that the car in question was not equipped with a coupler that could be coupled without the necessity of men going between the cars. But the Court also charged the

jury as to the duty on the part of the deceased to use the pin lifter before going between the cars; and in that connection told the jury, in substance, that, in the absence of any evidence to the contrary, it would be presumed that the deceased performed such duty.

It cannot be doubted, we submit, that, in the absence of anything to show the contrary, the law presumes that one was in the performance of such duty or in the exercise of such care as the particular circumstances of the situation required of him at the time. Such presumption finds application to a great variety of situations (Worthington v. Elmer, 206 F. 306, 308; New England Portland Cement Co. v. Hatt, 231 F. 611, 617). And we further submit that where there is no evidence tending to rebut or repel such a presumption, it is not error to acquaint the jury with the fact that such presumption exists and to authorize them to reckon with it. Such a presumption is very much like the presumption against suicide. And where the issue is whether a deceased came to his death by accidental means or by suicide, the rule is that, in the absence of evidence tending to show that the death was not accidental, the presumption against suicide does not cease when the case is sent to the jury but remains in the case, and it is not error for the Court to advise the jury of the existence of such presumption and permit the jury to reckon therewith (Travelers Ins. Co. v. McConkey, 126 U. S. 661; N. Y. Life Ins. Co. v. Gamer, 303 U. S. 161). In the McConkey case, supra, the Supreme Court held that the trial court did not err "in saying to the jury that upon the issue as to suicide the law was for the plaintiff, unless that presumption was overcome by competent evidence"; saying that the burden placed upon the plaintiff in the case did not deprive her "of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts." And in the later Gamer case the

Court, though holding the instruction there erroneous because in that case there was evidence tending to dispel the presumption, considered the McConkey case, did not overrule it, but held that the opinion therein is consistent with the theory upon which the Gamer case was ruled.

And in this connection it may be noted that in New York. Life Ins. Co. v. Brown (5th Cir.), 39 F. (2d) 376, the Court, in an action on a policy of accident insurance, held that the trial court did not err in instructing the jury that if the evidence was evenly balanced on the issue of accidental death or suicide, the presumption against suicide would govern, but that if the evidence showed the jury the truth then to "follow the truth and leave the presumption."

In the instant case there was no evidence that Stewart did not undertake to use the pin lifter before going between the cars; no evidence that he did not perform whatever duly rested upon him in that connection. And consequently the presumption that he acted in the performance of his duty did not cease or disappear from the case, and it was not error to so advise the jury. And, as we have said, this portion of the charge related only to the conduct of the deceased. To tell the jury of the existence of such presumption, relating solely to his conduct, could not, we submit, have caused the jury to think that because of the existence of such presumption they could infer that the defendant had breached its duty with respect to equipping its cars. And this is particularly true in view of the charge as a whole, a matter to which we shall now refer.

II.

And we respectfully submit that this Honorable Court, in holding that this isolated portion of the charge constituted reversible error, inadvertently overlooked and failed to apply the rule that in determining whether a charge is prejudicially erroneous, the charge as a whole is to be

considered and not some isolated portion of it. This timehonored rule has been time and again announced and applied by this Court.

Valley Shoe Corp. v. Stout (8th Cir.), 98 F. (2d) 514, l. c. 520;

Metropolitan Life Ins. Co. v. Armstrong (8th Cir.), 85 F. (2d) 187, l. c. 194;

Pryor v. Strawn (8th Cir.), 73 F. (2d) 595, 596;

Zurich General Accd. & Lia. Ins. Co. v. O'Keefe (8th Cir.), 64 Fed. 768, l. c. 771;

S. S. Kresge Co. v. McCallion (8th Cir.), 58 F. (2d) 931, 933, 934;

Travelers Ins. Co. v. Shinkel (8th Cir.), 37 F. (2d) 254, l. c. 255;

Morgan v. United States (8th Cir.), 98 F. (2d) 473, l. c. 477.

In the instant case, when the charge as a whole is considered, it seems quite clear that that portion thereof referring to the presumption, that is, that, in the absence of evidence to the contrary, the law presumes that the deceased used the pin lifter before going between the ends of the cars, could not have had the effect of causing the jury to believe that because of such presumption as to the conduct of the deceased they could infer that the coupling device was defective, or that such presumption could have the effect of relieving the plaintiff of the burden of proving, by the preponderance or greater weight of the evidence, that the defendant did not have its car equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars. The Court fully and repeatedly instructed the jury as to the burden resting upon the plaintiff, and repeatedly told the jury that there was no presumption that the coupler would not couple automatically by impact. We set out below those portions of the charge relating to these matters, as follows:

"The Court charges the jury that before plaintiff may recover in this case she must prove by the preponderance or the greater weight of the evidence that the injury to and death of plaintiff's decedent were caused by the cars in question not being equipped with couplers coupling automatically by impact.

"You cannot presume that the couplers would not couple by impact, but, on the contrary, the law places on plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater

weight of the credible evidence.

"This burden abides with plaintiff throughout the case, and if you find that plaintiff has not proved the above facts to your reasonable satisfaction by the preponderance or greater weight of the evidence, or if you find the evidence on the subject to be evenly balanced, then in either state of events plaintiff is not entitled to recover against defendant, and your verdict must be for the defendant" (Tr. 337).

"The Court charges the jury that you cannot presume that the couplers on the cars in question would not couple automatically by impact, but, on the contrary, the law places upon the plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the evidence.

"Unless plaintiff has proven such facts to your reasonable satisfaction, as above stated, then plaintiff is not entitled to recover in this case, and your verdict

must be for defendant.

"The Court charges the jury in this case that the burden of proof rests upon the plaintiff to prove by the preponderance, that is, the greater weight of the credible evidence, the fact necessary to entitle her to recover, and the burden of proof does not shift from side to side, but constantly remains with the plaintiff; therefore, if you find the evidence to be evenly balanced in this case, or if you find plaintiff has not proved by the preponderance, that is, the greater

weight of the evidence, facts necessary to entitle her to recover, then your verdict must be for the defendant.

"There is no presumption in this case that the coupler would not couple automatically by impact.

"The burden of proof predominates upon plaintiff, from the beginning to the end, to prove by the preponderance of the evidence the couplers would not couple automatically by impact, and, as a proximate result thereof, plaintiff's decedent was injured and died" (Tr. 338, 339).

When the above-quoted portions of the charge are considered in connection with that portion thereof which the Court has held to be erroneous, it would seem quite clear that from the charge as a whole any jury would be bound to fully understand just where the burden of proof lay; that plaintiff throughout carried the burden of proving by the preponderance or greater weight of the evidence that the car in question was not equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars and that the injury and death of the deceased proximately resulted from such breach of duty on the part of the defendant. And from this charge as a whole any jury would be bound to understand that they could not presume that the car was not equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars, but that they must find from the evidence that plaintiff has proved this by the preponderance or greater weight of the evidence.

And, as we have said, there was abundant evidence, in the testimony of the brakeman, Stogner, from which the jury could find that the coupling device was inefficient and not such as the law required; for after the accident Stogner, in order to effect a coupling, was compelled to go in between the cars and operate the knuckles by hand (Tr. 34), after having tried to use the pin lifter (Tr. 36). And Stogner testified that if the pin lifter is working it is not necessary to go between the cars (Tr. 40).

If it may be said to have been technically erroneous to tell the jury that, in the absence of evidence to the contrary, the law presumed that the deceased used the pin lifter before going between the ends of the cars (and for the reasons stated above we submit that it was not even technically erroneous), such error, if any, was, we respectfully submit, harmless and nonprejudicial, in view of the charge as a whole.

In United States v. Wescoat, 49 F. (2d) 193, the trial judge erroneously instructed the jury that if the insured developed active tuberculosis prior to January 1, 1925, he was presumed to have contracted it while in the army. No such presumption obtained. The Court, however (1. c. 194), held that such error was harmless in view of the issues and the evidence in the case and in view of the fact that the trial court "clearly, correctly and fully charged the jury as to what constituted total and permanent disability within the meaning of the policy, charging them explicitly in this connection that, before plaintiff could recover, he must satisfy them, by a preponderance of the evidence, that he was totally disabled," etc. And the Court said:

"In view of this charge, we do not think that the erroneous instruction that the disease was presumed to be of service origin could have prejudiced defendant; and in this respect the instant case differs from the Searls case (49 F. [2d] 224) where the presumption as to service origin was made practically determinative of the issues."

In the instant case it is entirely clear, we respectfully submit, that the presumption alluded to by the trial court in that portion of the charge which this Court has held to be erroneous, was not in any sense determinative of the real issue involved in this branch of the case. The real issue, as to this branch of the case, was whether the defendant had its car equipped with a coupling device such as the law required. And the trial court, in its charge, over and over again told the jury, in effect, that they must determine that issue from the evidence, and that the burden was upon the plaintiff to establish such breach of duty on the part of defendant by the preponderance or greater weight of the evidence.

Ш.

And in this honorable court error is no longer presumptively prejudicial. On the contrary, the burden is upon the appellant to show, from the record as a whole, that an alleged error below constituted a denial of some substantial right.

In the recent case of Morgan v. United States, 98 F. (2d) 474, l. c. 477, this Court, in an opinion by his Honor, Judge Van Valkenburgh, who wrote the opinion in the instant

case, said:

"Under the law, as now declared, 'the former practice of holding an error reversible unless the opposite party can affirmatively demonstrate it was harmless is changed, and the burden now is on the complaining party to show from the record as a whole the denial of some substantial right.' Hall v. United States, 8 Cir., 277 F. 19, 23; Trope v. United States, 8 Cir., 276 F. 348; Salerno v. United States, 8 Cir., 61 F. (2d) 419, 424, Par. 391 (28 U. S. C. A.), amending Par. 269, Judicial Code." (Emphasis ours.)

In Scritchfield v. Kennedy (10th Oir.), 103 F. 467, the Court (l. c. 474) said:

"It appears from the evidence that the verdict of the jury was proper. As a rule a judgment should not be set aside on technical grounds. When instructions are construed together as a whole, in the light of all the evidence, the law of the case being fairly presented, under Act of February 26, 1919, amending Judicial Code, Section 269, 28 U. S. C. A., Sec. 391, requiring the Court of Appeals to look to the entire record, including pleadings, evidence, instructions and all other matters properly of record, and render judgment without regard to technical errors, the former practice of holding an error reversible unless the opposite party can affirmatively demonstrate it was harmless being changed, the burden now is on the complaining party to show from the record as a whole the denial of some substantial right." (Emphasis ours.)

In the instant case, on the issue of defendant's liability as for a violation of the Safety Appliance Act, "the verdict of the jury was proper." The verdict is plainly for the right party. We call the Court's attention specially to the fact that though plaintiff adduced evidence tending strongly to show that this coupling device was inefficient and not such as the law required, the defendant, on that issue, stood mute and offered no testimony whatsoever. After the defendant's own brakeman, Stogner, called as plaintiff's witness, had given testimony admitting of no inference other than that this coupling device was defective and inefficient (Tr. 34, 36, 40), the defendant had not a word of testimony to offer tending to show that its coupling device was in good order and reflicient. Here is a case where a man was killed while attempting to effect a coupling between two cars. After the fatal injury, another brakeman was unable to open the knuckles by means of the pin lifter and was compelled to go between the cars to effect a coupling by hand. And the defendant had every opportunity to inspect these cars and this coupling device after the accident and thus definitely ascertain the condition of the coupling device. Yet defendant offered no testimony on the subject. Consequently, as said in Scritchfield v. Kennedy (103 F. [2d] 474) "it appears from

the evidence that the verdict of the jury was proper." And, as ruled in that case, and in Morgan v. United States. supra, 98 F. (2d), l. c. 477, and in many other cases as well, the former practice of holding an error reversible unless the opposite party affirmatively demonstrates that it was harmless, has been changed by statute, and "the burden is now on the complaining party to show from the record as a whole the denial of some substantial right." In this case the appellant had not borne that burden. When the evidence as a whole, on the issue of defendant's liability as for a violation of the Safety Appliance Act, is considered, and when the charge as a whole is considered. appellee respectfully submits that it is plain that there has been no denial to appellant any substantial right; that upon the record as a whole this judgment should be affirmed.

Appellee therefore prays that the Court grant a rehearing of this cause to the end that the things and matters hereinabove referred to may be properly and adequately presented to the Court for its consideration.

Respectfully submitted,

CHARLES M. HAY, CHARLES P. NOELL, Attorneys for Appellee.

Certificate of Counsel.

Charles M. Hay and Charles P. Noell, counsel of record for appellee in the above-entitled cause, do hereby certify that the above and foregoing petition of appellee for a rehearing of said cause is filed in good faith and is believed by them to be meritorious.

> Charles M. Hay, Charles P. Noell, Attorneys for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 15, 1940. [fol. 437] (Order Granting Petitions for Rehearing, Vacating Judgment Heretofore Entered and Assigning Case for Hearing at the March Term, 1941.)

November Term, 1940. .

Saturday, December 7, 1940.

Petitions for rehearing were filed by counsel for both parties to this cause, appellant and appellee, and after consideration thereof, It is now here ordered by the Court that said petitions, be, and they are hereby, granted.

It is further ordered by the Court that the judgment of this Court in this cause entered November 1, 1940, be, and it is hereby, vacated, set aside and held for naught, and that this cause be placed on the calendar of cases for hearing at the March Term 1941 of this Court.

December 7, 1940.

(Appearance of Mr. Wm. H. Allen as Counsel for Appellee.)

The Clerk will enter my appearance as Associate Counsel for the Appellee.

WM. H. ALLEN, 1725 Pierce Building, St. Louis, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1941.

[fol. 438] (Order of Submission on Rehearing.)
United States Circuit Court of Appeals
Eighth Circuit

March Term, 1941.

Monday, March 10, 1941.

Before Judges Gardner, Sanborn and Thomas.

Southern Railway Company, Appellant, No. 11,609. vs.

Clarence A. Stewart, Administrator, etc.

Appeal from the District Court of the United States for the Eastern District of Missouri. This cause having been called for rehearing in its regular order, after granting of petitions for rehearing, the same was argued by Mr. Walter N. Davis and Mr. Arnot L. Sheppard for appellant and by Mr. Charles H. Hay and Mr. William H. Allen for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 439)

(Opinion.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 11,609.—MARCH TERM, A. D. 1941.

Southern Railway Company, a corporation,

Appellant,

VR.

Clarence A. Stewart, Administrator of the Estate of John R. Stewart, Deceased,

Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

[April 14, 1941.]

- Mr. Walter N. Davis and Mr. Arnot L. Sheppard (Mr. Wilder Lucas was with them on the brief) for Appellant.
- Mr. Charles M. Hay and Mr. William H. Allen (Mr. Charles P. Noell was with them on the brief) for Appellee.

Before Gardner, Sanborn and Thomas, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the Court.

This was an action brought by the original appellee, Mary Stewart, widow of James R. Stewart, deceased, and the administratrix of his estate, to recover damages for injuries to and the alleged wrongful death of her husband while in the employ of appellant railroad company as a switchman. After the appeal had been perfected and was pending in this court, appellee Mary Stewart died, whereupon Clarence A. Stewart, as administrator of the estate of James R. Stewart, was substituted as appellee.

The action is bottomed upon the alleged violation of the Safety Appliance Act, and is brought under the Federal Employer's Liability Act (Title 45 U.S.C.A., Sec. 51). At the time of the accident resulting in the injury to and death of James R. Stewart, he was in the employ of the Southern Railway Company, a common carrier, as a switchman, working as a member of a switching crew in the yards of the defendant at East St. Louis, Illinois, and it is conceded that at the time of receiving his injuries he and the railway company were engaged in interstate transportation. It will be convenient to refer to the parties as they were designated in the lower court.

While engaged in coupling up certain cars on track 12, Stewart's arm was crushed by impact between the couplers of two cars which he was attempting to couple. He died two days later as the result of such injury. It was charged by the plaintiff that the defendant had violated the provisions of the Federal Safety Appliance Act, by furnishing on its line cars used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. In addition to its general denial, the defendant pleaded affirmatively that the action had been compromised and settled for the sum of \$5,000.00 and that plaintiff had executed a release and that the Probate Court of St. Clair County, Illinois had made and entered its order approving such settlement. By way of reply, plaintiff admitted that the settlement had been made and had been approved by the Probate Courand that a release had been signed but that such settlement was procured by means of fraud and duress.

At the close of all the testimony defendant moved for directed verdict upon substantially the followin grounds: (1) there was no substantial evidence showin or tending to show that the defendant was guilty of an actionable negligence or want of duty as charged in th petition; (2) there was no substantial evidence that an want of duty of the defendant was the proximate cause of the fatal injury received by plaintiff's intestate; (3) appears that plaintiff secured from the Probate Court of St. Clair County, Illinois, an order authorizing a settle ment by her of all claims and demands on account of in juries to her deceased husband for the sum of \$5,000.00 pursuant to which she had in fact settled and satisfied a claims and executed a release, and the order and judg ment of the Probate Court of St. Clair County, Illinois was not subject to collateral attack and was binding upo the plaintiff; (4) there was no substantial evidence show ing or tending to show that the defendant, its agents of servants, were guilty of any actionable fraud or duress i procuring such settlement. The motion was denied an the court sent the case to the jury upon instructions t which certain exceptions were saved by the defendant. Th jury returned a verdict for plaintiff in the sum of \$17,500.00, and thereafter defendant moved for judgmen notwithstanding the verdict, or, in the alternative, for new trial, upon the grounds set out in the motion for directed verdict and the further ground of error in th charge to the jury, besides other grounds not now materia The motion was denied and from the judgment entere defendant prosecutes this appeal.

We reversed on the ground that the court erred in its structing the jury, and remanded the case for a new trie (Southern Railway Co. v. Stewart, 115 F.2d 317). Bot parties petitioned for a rehearing. The plaintiff, in its petition for rehearing, contended that the lower court has

not erred in instructing the jury, while the defendant urged in its petition, that we should have sustained its contention with reference to the alleged error of the lower court in refusing to grant its motion for a directed verdict, contending that there was no substantial evidence that the deceased attempted to open the coupler knuckles by using the pin lifter, an appliance provided to operate the automatic coupler, before going between the ends of the cars which he was attempting to couple, and that there was no evidence that the coupler was defective. Upon reargument, defendant asserts two errors of the lower court: (1) the court erred in denying its motion for a directed verdict, and (2) the court erred in instructing the jury on the questions of defendant's duty and proximate cause. On this reargument the question of the insufficiency of the evidence is brought sharply to our attention, and in our view of the record, it will only be necessary to consider that question.

The statute prohibits a common carrier from using or hauling "any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of cars." The test of compliance with these requirements is the operating efficiency of the appliances with which the car is equipped. When a violation of the act is alleged as the basis of a cause of action for damages, the question is not simply whether the coupling device as originally installed conformed to the statutory requirements, or whether the carrier has exercised proper care in keeping it in condition to function efficiently, nor whether the equipment is defective in a general sense through the negligence of the carrier. It is generally held that a violation of the statute is shown by proof that cars upon a fair trial failed to couple automatically by impact. Neither of the parties here question these generally applicable tests. Having them in mind, we shall refer to the proof.

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These couplers weigh some forty pounds each. When functioning properly, they will couple automatically by

impact when either one or both couplers are open, but they will not couple automatically when both knuckles are closed. As one faces the end of a car properly equipped with automatic couplers, on the left side is a pinlifting lever. Where both knuckles of the couplers are closed, it is necessary to prepare the car for coupling on impact by opening one of these knuckles. This, in a properly functioning coupler, may be accomplished by the use of this pinlifting lever, which extends to the outer side of the car, without the necessity of going between the ends of the cars.

Stewart received his injuries on February 12, 1937. He was an experienced switchman sixty years old, and the switching crew of which he was a member was doing certain switching on track number 12. This track extended east and west and was a straight track. The crew had a group of seventeen cars on this track, which were to be coupled together and then transferred to various industrial switch tracks. The engine was headed west, with all of the cars to be coupled east of it. About seven or eight of the cars, those nearest the engine, had been coupled together and were attached to the engine at the time of the accident. Stewart, with the other switchmen, was working on the north side of this track, and the engineer was on the north side of his engine. The engineer was operating under signals from Stewart. It was about 5:40 o'clock p.m. Just previous to the accident, the deceased gave the engineer a back-up signal and then a stop signal. The cars were coupled. Deceased walked back to the next car, gave the engineer another back-up signal and a stop signal, both of which were obeyed by the engineer. This left an opening between the seventh and eighth car, and there had been no effort to make this coupling by impact prior to the time the car was stopped, leaving an opening between it and the car to which it was to be coupled. After the car had been stopped pursuant to deceased's signal, he stepped into the space between the two cars and a little later the engineer heard him "holler," and although the engineer had not moved the cars that had been coupled together after deceased gave the stop signal, there was

nevertheless a collision between the two cars, and deceased's arm was crushed between the couplers of the two cars. Obviously, the car east of the opening must have been shunted west by contact with some force from the east, although the record is silent on this question, and no cause of action is predicated upon that fact.

The available pin lifter lever was on the north side of the west end of the car east of the opening. That was the only pin lifter available to the deceased on the north side of the cars in the opening between the two. It was the duty of the deceased to use the pin lifter in opening the knuckle on the car so as to prepare it for impact. C. & O. R. Co. v. Charlton, 4 Cir., 247 F. 34. There is no evidence that he did so. The engineer, who was taking his signals from the deceased, testified that, "There was no obstruction between me and him when he gave me the stop signal and went between the cars." The visibility was "pretty clear," and deceased signaled with his hand, which the engineer could see. He testified that he did not notice deceased attempt to use the pin lifter before he went in between the cars, although he was looking at deceased for signals all the time. This would seem to be proof of a negative as nearly as such proof could be made. The engineer who was in position to see and whose business it was to observe what movements the deceased made, testified that he did not see him attempt to use the pin lifter. The effective use of the pin lifter requires a visible effort which could scarcely have gone unnoticed had it been made. The knuckle to be opened weighs some forty pounds. As said by us in Chicago, M. St. P. & P. R. R. Co. v. Linehan. 66 F.2d 373:

"If plaintiff failed to operate the coupler in a proper manner, the fact of its not working would be no evidence of defect. Just how much force may be necessary in operating the pin lever in order to bring about an opening of the knuckle cannot be definitely stated. There is no accurate measuring stick. One pull of the lever might be sufficient if enough force were put behind it, and there

might be as much force exerted in one pull as in two or three. The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition? * A court cannot say that one pull upon the lever and failure of the same to respond, regardless of the force used or the manner of operation, is sufficient to show a defective coupler, nor can it say on the other hand that one pull can never be sufficient to show reasonable force."

The point we are here making is that had the deceased made the attempt to operate the pin lifter, his efforts, under the circumstances, could not have escaped the observance of the engineer who was a witness for the plaintiff. The burden of proof was, of course, upon the plaintiff. There had been no previous unsuccessful attempt to make this coupling by impact, which might have been some evidence of insufficiency or defect. It is argued that deceased was excused from any effort to prepare the coupler for impact by use of the pin lifter because it is said there was evidence that the pin lifter did not respond. This contention is based upon the testimony of the switchman Stogner. He testified as follows:

- "Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident?
 - A. I did.
 - "Q. How did you open the knuckle?
 - "A. I opened it with my hand.
- "Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?
 - "A. No, sir."

He testified that after the accident he found both knuckles of both couplers closed.

There was no evidence of mechanical defect or insufficiency in the couplers, including the pin lifter. There was no evidence of an unsuccessful attempt to couple them

by impact when prepared for coupling. The testimony of the foreman that he opened the knuckle with his hand does not indicate that there was a defect in the coupling device. His testimony that it is not necessary to go in between the cars to open the coupler with one's hands, if the coupler or pin lifter is working automatically, adds nothing to the proof as to the condition of the couplers on these cars. It certainly does not prove that the coupler or pin lifter on this particular car did not operate satisfactorily. On cross-examination the witness was asked which knuckle he tried to open or which pin lifter he tried to use, and he answered, "The one on the north side." But he does not testify that he was unable to open the knuckle by use of the pin lifter, nor what, if any, effort he made so to do. It must be remembered that this incident occurred after the accident and after deceased's arm had been crushed in the coupler. What effort he made to open the knuckle by use of the pin lifter, or what force he applied, finds no answer in this record but is left to conjecture. Did he make "an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner," and did he make application of "enough force to open the knuckle if the coupler was in proper condition"? It does not even appear whether this "try" to open the knuckle came after the knuckle was opened or before. A very essential element is left to conjecture and speculation. " * where proven. facts give equal support to each of two inconsistent inferences; * * neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other * * . . . Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333; Wheelock v. Freiwald, 8 Cir., 66 F.2d 694. Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict can not be permitted to

stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence. Midland Valley R. Co. v. Fulgham, 8 Cir., 181 F. 91.

There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the defendant's motion for judgment in its favor notwithstanding the verdict.

[fol. 447],

(Judgment.)

United States Circuit Court of Appeals Eighth Circuit.

March Term, 1941.

Monday, April 14, 1941.

Southern Railway Company, a corporation, Appellant, No. 11,609. vs.

Clarence A. Stewart, Administrator of the Estate of John R. Stewart, deceased.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Southern Railway Company, a corporation, have and recover against Clarence A. Stewart, Administrator of the Estate of John R. Stewart, deceased, the sum of Dollars for its costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to grant the defendant's motion for judgment in its favor notwithstanding the verdict.

April 14, 1941.

United States Circuit Court of Appeals,

NO. 11,609.

Civil.

SOUTHERN RAILWAY COMPANY. a Corporation, Appellant,

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CLARENCE A. STEWART, Administrator of the Estate of JOHN R. STEWART, Deceased,
Appellos.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLEE'S PETITION FOR A REHEARING.

Comes now appellee in the above-entitled cause and files this, his petition for a rehearing of said cause, and prays that the Court grant appellee a rehearing of said cause, and as grounds for his said petition states that the Court in its opinion rendered and filed herein on April 15, 1941, has inadvertently overlooked material matters of law and fact, as shown by said opinion, and that said opinion is contrary to many prior decisions of this Court and of the Supreme Court of the United States, as hereinafter appears.

I.

This Honorable Court in its former opinion herein, filed on November 1, 1940 (Southern Railway Company v. Stewart, 115° Fed. [2d] 317), held that the evidence adduced below sufficed to make the case one for the jury. This Court held that there was evidence from which a jury could lawfully find that appellant had breached the duty placed upon it by the automatic coupler requirement (Sec. 2) of the Safety Appliance Act in failing to have its cars equipped with couplers such as the act requires, and that Stewart's death proximately resulted from such breach of duty. In its said former opinion, this Court (115 Fed. [2d], l. c. 321) said:

"We are asked to declare that, on the record before us, the motions of appellant for a directed verdict and for a verdict in its favor non obstante veredicto should have been austained; but in view of that record, we cannot say that the inference might not reasonably have been drawn by the triers of the fact that there was probable cause to believe that the injury suffered was caused by the breach of duty charged."

The Court held, however, in said former opinion, that the trial court erred in its charge to the jury, and because thereof ordered that the judgment be reversed and the cause remanded for a new trial. In its last opinion herein, rendered on April 14, 1941, after a rehearing of the cause, the Court holds that there is no substantial evidence that the deceased came to his death by reason of the failure of appellant to equip its cars with couplers as required by the act, and orders that the judgment be reversed and the cause remanded with directions to grant appellant's motion for judgment in its favor notwithstanding the verdict.

Appellee respectfully submits that in so ruling the Court has inadvertently overlooked and failed to apply ele-

mentary, fundamental rules of law-to be observed in passing upon a motion for a directed verdict.

It is the settled rule of decision of the federal courts that, in passing upon a motion for a directed verdict, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fairminded men may honestly draw different inferences or conclusions from the evidence, the question is one of fact for the jury.

These principles have been enunciated and applied in a long list of cases, with which the Court's last decision herein conflicts, among which are the following:

Gunning v. Cooley, 281 U. S. 90;

Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 192, 193;

New York Central R. Co. v. Marcone, 281 U. S. 345;

Lumbra v. United States, 290 U. S. 551, 553;

Walkup v. Bardsley (8th Cir.), 111 Fed. (2d) 789, l. c. 791, 792;

Schwarz v. Fast (8th Cir.), 103 Fed. (2d) 865, l. c. 867;

Jones v. United States (8th Cir.), 112 Fed. (2d) 282, l. c. 287;

Elzig v. Gudwangen (8th Cir.), 91 Fed. (2d) 434;

Falstaff Brewing Corp. v. Thompson (8th Cir.), 101 Fed. (2d) 301, 303;

Asher v. United States (8th Cir.), 63 Fed. (2d) 20, l. c. 23 p

Illinois Power & Light Corp. v. Hurley (8th Cir.), 49 Fed. (2d) 681, l. c. 686;

Chicago, St. P. M. & O. Ry. Co. v. Kulp (8th Cir.), 102 Fed. (2d) 352, 356;

Line v. Erie R. Co. (6th Cir.), 62 Fed. (2d) 657, 659; Worthington v. Elmer (6th Cir.), 207 Fed. 306, 308. II.

On pages 7 and 8 of the manuscript opinion, the Court first says that it was the duty of the deceased to use the pinlifter in opening the knuckle on the car so as to prepare it for impact, and that there is no evidence that he did so; and then, in effect, holds that the testimony of the engineer, Martin, conclusively shows that the deceased did not try to use the pinlifter before going between the cars to effect a coupling by hand.

In stating that it was the duty of the deceased to use the pinlifter, the Court has inadvertently overlooked the fact that a recovery may not be denied on the ground of a breach of duty on his part. No duty is placed upon an employee by the act. By the express terms of the act an employee cannot be denied a recovery upon the ground of negligence on his part in failing to use the pinlifter or otherwise. (45 U. S. C. A., Sec. 53, Act of April 22, 1908, c. 143, Sec. 3, 35 Stat. 66.) Whether a deceased employee killed in endeavoring to effect a coupling tried to use the pinlifter before going between the cars, or whether this may be presumed or inferred, is of consequence only on the question whether the inoperative coupler, if any, was the proximate cause of the injury.

In this portion of its last opinion herein the Court has inadvertently overlooked the fact that in order to recover it was not incumbent upon the plaintiff to adduce any testimony that Stewart undertook to use the pinlifter before going between the cars. If there was evidence warranting the jury in finding, if by inference only, that the pinlifter was inefficient and inoperative (and, for the reasons to be hereafter stated, we submit there was such evidence), then the presumption, prima facie, prevailed that Stewart did undertake to use the pinlifter before going between the cars, and a case was made for the jury. Such

presumption is indulged in the absence of evidence to the contrary—such evidence as a jury would be bound to accept as repelling the presumption or putting it to flight. In the absence of such evidence, the presumption always prevails that a deceased performed whatever duty may have rested upon him under the particular circumstances of the case. Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, l. c. 474; Looney v. Metropolitan R. Co., 200 U. S. 480, l. c. 488; Worthington v. Elmer, 207 Fed. 306, 309; New Aetna Portland Cement Co. v. Hatt, 331 Fed. 611, 617.

The case of Chesapeake & Ohio Ry. Co. v. Charlton, 247 Fed. 34, cited by the Court in this connection, constitutes, we submit, no authority for the proposition that recovery may not be had without proof that the deceased attempted to use the pinlifter before going between the cars. In the Charlton case there was no evidence that the couplers were defective or inoperative. The only evidence as to their condition was that adduced by the defendant to the effect that a thorough inspection after the casualty showed that all parts thereof were in perfect working condition. There was consequently nothing at all to show a violation of the act by the defendant, and this was the real ground of the decision; for the Court held that if the coupler had been out of order it would have been the duty of the trial court to have submitted the case to the jury. (247 Fed., 1. c. 36.)

And in holding, in effect, that the testimony of the engineer conclusively shows that the deceased did not try to use the pinlifter before going between the cars to effect a coupling by hand, the Court, we respectfully submit, has plainly violated the rule that in passing upon a demurrer to the evidence or, a request for a directed verdict the evidence is to be viewed in the light most favorable to the

plaintiff, giving the plaintiff the benefit of every inference that may fairly and reasonably be drawn from the evidence; and has also plainly violated the rule that the jurors are the judges of the credibility of the witnesses and the weight to be given to their testimony.

Martin, the engineer, testified:

"Q. Did you pay any attention to whether or not Stewart used the pinlifter before he went in there! A. I did not notice him.

Q. You did not notice? A. I did not notice him.

Q. As an engineer, what do you look out for all the time? A. Look out for signals" (Tr. 46).

We submit that this testimony, upon its very face, obviously amounts to nothing more than testimony that the witness did not pay any attention to whether Stewart did or aid not undertake to use the pinlifter before going between the cars. The witness was pointedly asked if he paid any attention "to whether or not Stewart used the pinlifter before he went in there," and his answer simply was, "I did not notice him." One of the dictionary definitions of the verb "to notice" is to "pay attention to." natural interpretation of Martin's testimony, therefore, particularly in view of the form of the question propounded to him, is simply that he paid no attention to whether Stewart did or did not use the pinlifter. And this is further strengthened by the fact that he followed this by saying that what he did all the time was to look out for signals. There is not a scintilla of evidence that he was under any duty to observe whether or not Stewart used the pinlifter. He did not profess to be under any such duty. On the contrary, his testimony shows that he was concerned only with signals for the operation of his engine.

But if there may be any question as to what Martin meant by this testimony, surely, we submit, it was for the jury to say what effect and weight was to be given thereto. Viewing it in the light most favorable to the plaintiff, as it must be viewed on demurrer to the evidence, it means simply that the witness was telling the jury that he paid no attention to Stewart beyond keeping a lookout for his signals.

Furthermore, the evidence showed that there were seven or eight loaded and coupled freight cars, as well as the tender, between the engine and Stewart when the latter approached the opening between the two cars coupled together (Tr. 29). An average car is 40 feet in length (Tr. 44), and there were openings between the cars. Viewing the evidence in the light most favorable to plaintiff, Martin was fully 350 feet away from Stewart at the time. According to Stogner's testimony, it was about dusk (Tr. 27). And this must be accepted as true. And when Stewart, after giving Martin the stop signal, went to the opening between the bodies of the two cars that were to be coupled together he naturally faced that opening, faced south, with his right side turned toward Martin, who was west of him. The pinlifter is normally operated by the left hand (Tr. 33), because of its location at the left of the one facing the opening between cars to be coupled (Tr. 33). With Stewart standing—as he doubtless was, and as the jury could find he was-at the very side of these cars, with his left hand and arm hidden from Martin's view, we are unable to perceive how Martin, fully 350 feet away, with darkness coming on, could have seen, with any degree of certainty, what Stewart did with his left hand. Under such circumstances, if Martin had undertaken to testify positively that Stewart did not attempt to use the pinlifter, the jury would have been fully warranted in rejecting such testimony as constituting no substantial evidence on the subject, and without probative force, because of the witness' lack of opportunity to observe with any degree of certainty what Stewart did in that connection.

"It is elementary that in the trial of an action at law, the jurors are the sole and exclusive judges of the facts, of the credibility of the witnesses, and of the weight of the evidence." Evidence which is uncontradicted is not necessarily to be accepted as true. Its weight and the credibility of the witnesses who gave it are usually for the jury to determine." Elzig v. Gudwangen (8th Cir.), 91 Fed. (2d) 434, l. c. 440. (Emphasis ours.)

In the case last cited the opinion, by Judge Sanborn, is very exhaustive, citing and quoting from many cases holding that a jury is not bound to accept the testimony of a witness, even though he is not contradicted by any other witness; that jurors have the right to consider all of the facts and circumstances bearing upon the credibility of the witness, his opportunity for observation, his relation to either party to the suit, and the probability or improbability of his statements when taken together with all of the other facts and circumstances in evidence, and then to give such weight, if any, to his testimony as they, in their judgment, deem proper.

We respectfully submit that in this case the jurors were plainly at liberty to regard this testimony of the witness Martin as constituting nothing more than testimony that he paid no attention to whether Stewart did or did not use the pinlifter; and were also plainly at liberty, in any event, to reject any testimony that Martin might give on this subject on the ground that the witness was so far lacking in opportunity for accurate observation under the circumstances as to make such testimony worthless.

This case was tried by the learned District Judge below upon the theory that the jury could, with propriety, consider Martin's testimony set out above as constituting no substantial evidence that Stewart did not attempt to use the pinlifter before going between the cars. This, we respectfully say, was entirely proper. The trial court, in that connection, followed the course pursued in Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461. The Court instructed the jury that "in the absence of any evidence that he (Stewart) did not use the pinlifter, the law presumes that he did use the pinlifter before going between the ends of the cars." The Court recognized that. under the evidence adduced, it was for the jury to say whether there was any evidence—evidence that the jury would accept as constituting substantial evidence—that Stewart did not use the pinlifter. In the Landrigan case, supra (191 U. S. 461), the trial court instructed the jury that in the absence of evidence to the contrary there was a presumption that the deceased stopped, looked and listened. This the Supreme Court of the United States held was proper; and that Court very significantly said:

"The court did not tell the jury that all those who cross railroad tracks stop, look and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence." (191 U. S., l. c. 474.)

If there was no evidence that Stewart did not attempt to use the pinlifter, none that the jury was bound to accept as such (and we say there was none), then the presumption is that Stewart did attempt to use the pinlifter before going between the cars. Certainly, we submit, a recovery may not lawfully be denied on the ground that the plaintiff did not adduce affirmative testimony that the deceased attempted to use the pinlifter before going between the cars.

Courts of very respectable authority have held that, where the action is for the death of an employee in a coupling operation and there is evidence warranting a finding that the coupling apparatus was inefficient or inoperative, it is not essential to a recovery that the plaintiff adduce testimony that the deceased employee attempted to use the pinlifter on such coupling apparatus before going between the cars.

In Yazoo & M. V. R. Co. v. Cockerham, 134 Miss. 887, 99 So. 14, the action was for the death of an employee, alleged to have been caused by the violation by defendant carrier of the duty placed upon it by the automatic coupling provisions of the Safety Appliance Act. The Court stated that "whether or not he (the deceased) tried to operate the coupling apparatus by use of the lever with his hand is not shown." There was testimony that an examination of the coupler shortly after the casualty showed that there was a nail in it at one place instead of a cotter pin, but defendant's foreman, who gave this testimony, said that the coupler was in first-class condition, as far as operation was concerned. However, tests made the following morning, with a nail at this particular place in. the coupler, instead of a cotter pin, showed that special manipulation of the lever might be necessary in order to operate the pinlifter. In holding that the case was one for the jury, the Supreme Court of Mississippi (99 So., l. c. 15, 16) said:

"In many of the cases there was no defect shown in the coupling appliance save the fact that the injured employee attempted to manipulate the lever which for some reason failed to work. In the case at bar while the testimony is silent as to any attempt to manipulate the lever, yet the testimony of the plaintiff is to the effect that the coupling appliances would not at all times work by the usual and customary manipulation of the lever. We think the jury were warranted from this testimony in believing this appliance defective and that it was not necessary before a recovery may be had to prove that the employee at



tempted to use the lift lever on the defective coupling appliance.

"The peremptory instruction for the defendant was

properly refused." (Emphasis ours.)

And in the Yazoo case the Supreme Court of the United States denied the defendant's petition for a writ of certiorari. 265 U. S. 586, 68 L. Ed. 1193.

In Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005, the deceased, a switching foreman, sustained fatal injuries by being crushed between two cars and died a few minutes later. An examination of the coupling apparatus after the casualty showed that the knuckle in question would not open by use of the pinlifter. A verdict for the plaintiff below was sustained on appeal, though no witness observed whether Hurley did or did not try to use the pinlifter before going between the cars.

On pages 7 and 8 of the opinion of April 14, 1941, the Court says:

"It is argued that deceased was excused from any effort to prepare the coupler for impact by use of the pinlifter because, it is said, there was evidence that the pinlifter did not respond."

We respectfully beg leave to call the Court's attention to the fact that nowhere in brief or oral argument has counsel for appellee ever argued that the deceased was "excused" from any effort to prepare the coupler for impact by use of the pinlifter. The Court has inadvertently misconceived the argument of appellee's counsel in this connection. We have contended, and still respectfully contend, that the testimony of the witness Stogner sufficed to warrant a finding that the pinlifting device of this coupler was inefficient and inoperative, in violation of the act; but we have not argued that, because of this, the deceased was "excused" from using the pinlifter before

going between the cars. To so argue would be to impliedly concede that he did not attempt to use the pinlifter. This we have never done. On the contrary we have always contended and still contend that under the circumstances the jury could rightfully presume that he did attempt to open the knuckle by means of the pinlifter before going between the cars to open it by hand; and that a jury, proceeding by fair inference could so find without the necessity of invoking the presumption as such. And the authorities cited above make it clear, we submit, that where there is evidence that the pinlifting device, designed to open the knuckle without the necessity of men going between the cars, is inefficient or inoperative, it is not necessary to a recovery that any direct proof be adduced that a deceased employee attempted to use the pinlifter before going between the cars.

III.

And in ruling, in its said last opinion, that the testimony of the witness Stogner is insufficient to support a finding by the jury that this coupling device was inefficient and inoperative and not such as to comply with the act, this Honorable Court, we submit, has inadvertently overlooked and failed to apply the above mentioned fundamental rules that in passing upon a motion for a directed verdict, it is the duty of the appellate court, as well as of the trial court, to view the evidence in the light most favorable to the plaintiff and to accord the plaintiff the benefit of every inference that may fairly and reasonably be drawn from the evidence, and that if the minds of reasonable men may differ as to what inferences or conclusions should fairly and reasonably be drawn from the evidence, then the case is one for the jury. Stogner's testimony in this connection, on direct examination, is set out in the opinion as fol"Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident? A. I did.

Q. How did you open the knuckle? A. I opened it

with my hand.

Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pinlifter, is it necessary to go in between the cars to open with your hands then? A. No, sir" (Tr. 34).

On cross-examination by appellant's counsel, Stogner testified:

"Q. Now, which knuckle did you try to open, or which pinlifter did you try to use? A. The one on the north side.

Q. On the north side? A. Yes, sir.

Q. And which was that? A. Well, that was the east car on the opening" (Tr. 36).

The Court in its opinion holds that this testimony does not indicate that there was a defect in the coupling device; that it does not prove that the coupler or pinlifter on this particular car did not operate satisfactorily. The Court says that Stogner did not testify that he was unable to open the knuckle by use of the pinlifter, nor what, if any, effort he made so to do. And the Court says:

"What effort he, Stogner, made to open the knuckle by use of the pinlifter, or what force he applied, finds no answer in this record but is left to conjecture. Did he make 'an earnest and honest effort to operate the coupler in an ordinary and reasonable manner' and did he make application of 'enough force to open the knuckle if the coupler was in proper condition?"

(The language quoted by the Court is from the opinion in Chicago etc. R. Co. v. Linehan, 266 Fed. 373, from which the Court quotes earlier in the opinion.) And the Court then continues:

"It does not even appear whether this 'try' to open

the knuckle came after the knuckle was open or before. A very essential element is left to conjecture and speculation."

We most respectfully submit that the Court has inadvertently, but utterly, failed to realize the force and effect required to be given to the testimony of the witness Stogner under the rules to which we have adverted above, applicable where a court is asked to declare that the evidence is insufficient to support a verdict below. If the evidence, indeed, is to be viewed in the light most favorable to the plaintiff, and if, indeed, the plaintiff is to be given the benefit of every inference that may be fairly and ligitimately drawn from Stogner's testimony, then, according to decisions in cases too numerous to mention, this testimony fully sufficed to warrant the jury in finding that this coupling device was inoperative and inefficient in that the pinlifter could not be operated so as to open the knuckle from the outside of the car, making it necessary to go between the cars to perform that operation.

It must be borne in mind that Stogner went to these two cars to effect a coupling of them shortly after Stewart had had his arm crushed by reason of going between the cars to open the knuckle by hand. He said he opened the knuckle by hand, and that this is not necessary if the pinlifter is working (Tr. 34). Is it, we ask, reasonable to suppose that Stogner, an experienced brakeman and the foreman of the crew, having freshly in mind the casualty that befell Stewart by reason of going in between these very cars to effect a coupling by hand, would have gone in to encounter the very same danger without first having made an earnest effort to use the pinlifter so as to avoid the necessity of going between the cars? Indeed, we submit that Stogner's testimony on direct examination alone sufficed to warrant the inference that he was required to go between the cars to open the knuckle by

hand because he was unable to do so by means of the pinlifting device. Surely no man in his senses, after such a calamity as had so recently befallen Stewart, would have taken the risk of going between the cars and using his hands to open the knuckle unless he had found that the pinlifting device was inoperative so as to make it necessary to open the knuckle by hand. We think that it would be difficult to find twelve, laymen, competent to serve upon a jury, who would not so conclude.

But this Honorable Court, in its opinion, not only holds that said testimony of Stogner on direct examination does not indicate that there was a defect in the coupling device, but further holds that his testimony on cross-examination that he tried to use the pinlifter mentioned, taken with his testimony on direct examination, does not suffice to warrant a finding that the pinlifter was inefficient or inoperative. Referring to Stogner's testimony on cross-examination, the Court, on page 10 of the manuscript opinion, says:

"But he does not testify that he was unable to open the knuckle by use of the pinlifter, nor what, if any, effort he made to do so. It must be remembered that this incident occurred after the accident and after deceased's arm had been crushed in the coupler. What effort he made to open the knuckle by use of the pinlifter, or what force he applied, finds no answer in the record, but is left to conjecture. Did he make 'earnest and honest effort to operate the coupler in an ordinary and reasonable manner,' and did he make application of 'enough force to open the knuckle if the coupler was in proper condition'? It does not even appear whether this 'try' to open the knuckle came after the knuckle was opened or before. A very essential element is left to conjecture and speculation."

We deem it quite clear that the only inference that may

reasonably be drawn from Stogner's testimony that he tried to use the pinlifter, taken with his testimony that. he went between the cars and opened the knuckle by hand, is that he made every reasonable effort to open the knuckle by means of the pinlifter before going between the cars to open it by hand. To say that one tried to use the pinlifter, but went between the cars to open the knuckle by hand—the very thing the pinlifter is designed to avoid -is to say that he attempted to operate the pinlifter but was unable to get it to function. Surely a jury would be fully warranted in inferring from this testimony that Stogner, in trying to use the pinlifter, applied such force and made such effort to operate it as to convince him, an experienced switchman, that it would not function and that it was necessary for him to do what Stewart did, namely, to go in between the cars and open the knuckle by hand, as he did.

We judge that it was through the merest inadvertence that the Court made the statement that "it does not even appear whether this 'try' to open the knuckle came after the knuckle was opened or before." After Stogner had gone in and opened the knuckle by hand, not only was there then no occasion for him to use the pinlifter, but a pull upon the lever, as to open the knuckle, would demonstrate nothing when the knuckle was already open. After the knuckle had been opened by hand, Stogner would have had no possible means of determining whether the pinlifter would open the knuckle, unless, indeed, after having opened it by hand he should again close it and then try to open it by means of the pinlifter. Surely, when Stogner said that he tried to use the pinlifter and also said that he went in and opened the knuckle by hand, no juror could reasonably have supposed that he first went in and opened the knuckle by hand and afterwards tried to see if it could be opened by means of the pinlifter.

In the Linehan case, 66 Fed. (2d) 373, I. c. 378, from which the Court quotes in its opinion, this Court made some observations, unnecessary to a decision in that case, to the effect that where proof of a defective coupling device rests alone upon the evidence of an unsuccessful attempt to use the pinlifter, to make out a case it should appear that the employee made an earnest and honest effort to open the knuckle by use of the pinlifter. But the Court in the Linehan case did not say that it is necessary to show by direct and positive testimony what effort an employee made to use the pinlifter before going between the cars to effect a coupling by hand. Nor, so far as we have been able to find, has any other court so held.

In this connection it may be observed that in Chicago, R. I. & P. Ry. Co. v. Brown, 229 U. S. 317, 1. c. 321, the Court said:

"And the concession is made that in the Taylor case, 210 U. S. 281, and in C. B. & Q. R. R. Co. v. United States, 220 U. S. 559, this court settled that the failure of a coupler to work at any time sustains a charge of negligence in that respect, no matter how slight the pull on the coupling lever." (Emphasis ours.)

It is now too well settled to admit of any question that the test of the observance of the duty placed upon the carrier by the act is the performance of the appliance; and that proof of the failure of a coupling appliance to function efficiently at any time, so as to enable the coupling to be effected without the necessity of men going between the cars, suffices to sustain a charge that the act was violated. San Antonio Ry. Co. v. Wagner, 241 U. S. 476; Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66; Chicago, M. St. P. & Pac. R. Co. v. Linehan, 66 Fed. (2) 373; Terminal R. Ass'n of St. Louis v. Kimbrel, 105 Fed. (2) 262; Philadelphia & Reading Ry. Co. v. Auchenbach, 16 Fed. (2) 550,

552, certiorari denied 273 U. S. 761; Didinger v. Pennsylvania R. Co., 39 Fed. (2) 798; Detroit T. & I. R. Co. v. Hahn, 47 Fed. (2) 59, certiorari denied 283 U. S. 842; Meek v. The New York, Chicago & St. L. R. Co., 337 Mo. 1188, 88 S. W. (2) 333; Lang New York Central R. Co., 255 U. S. 455.

The Court's last ruling herein is, we submit, in direct conflict with the cases last cited and with many others of like tenor. Stogner's testimony that he tried to use the pinlifter implies, by clear inference, that he made an earnest and honest effort to open the knuckle by means of the pinlifter before going between the cars—effort such as to satisfy him that the knuckle could not be opened in that manner and that it was necessary for him to go between the cars and effect the coupling by hand; the very evil against which the automatic coupler provision of the Safety Appliance Act is directed. Terminal R. Ass'n of St. Louis v. Kimbrel, 105 Fed. (2) 262.

In Geraghty v. Lehigh Valley R. Co., 70 Fed. (2) 300, the deceased employee was crushed between two cars and sustained fatal injuries. No witness observed what Geraghty did when he went between the cars, nor was there any testimony as to why he went between them. Geraghty signaled the engineer for the movement in question, and stepped between the two cars as they were about to meet. They came together lightly and made the coupling on the impact, but Geraghty was crushed between them because the coupler of one of the cars was in such condition as to allow the end sills to come too close together when the cars were coupled. The Court said:

"The defendant contends that, even if applicable, the evidence is insufficient to prove a cause of action for violation of the automatic coupler requirement. There is no direct testimony that Geraghty went between the cars for the purpose of effecting a coupling

 But the inference is most reasonable that such must have been his purpose; and one of the witnesses testified that he stepped between the cars 'as (if) to adjust a coupling.' . . There is no direct testimony that the condition of the cars rendered them incapable of coupling automatically on impact. fact they did couple on the first contact, but whether they would have done so had Geraghty not stepped between them is not shown. The defendant says it is mere speculation for the jury to find they would not. The plaintiff argues that from the fact Geraghty thought it necessary to step between them the jury may infer that the couplers were out of alignment or for some other reason required manual adjustment to omake the coupling. We think such an inference is permissible. If alignment or other adjustment were necessary it would supply evidence to carry the case to the jury. Atlantic City R. R. Co. v. Parker, 242 U. S. 56, 59, 37 S. Ct. 69, 61 L. Ed. 150; Hampten v. Des Moines etc. R. Co., 65 F. (2d) 899 (C. C. A. 8)." (Emphasis ours.)

The instant case is a much stronger case than the Geraghty case. When Stogner, an experienced brakeman, said he **tried** to use the pinlifter the inference, we say, follows, as night follows the day, that he made such effort to open the knuckle by means of the pinlifter as to determine that the knuckle could not be opened that way; that he went between the cars to open the knuckle by hand because he had found that the pinlifter would not function.

At the trial below appellant's learned counsel recognized the fact that Stogner's testimony on direct examination warranted the inference that he tried to effect an opening of the knuckle by use of the pinlifter before going between the cars. This is shown by counsel's question on cross-examination: "Which pinlifter did you try to use?" (Tr. 36). Appellant's counsel did not ask Stogner whether he attempted to use a pinlifter, but, assuming he had done

so, asked him which pinlifter he tried to use, and Stogner said he tried to use the pinlifter on the north side; the pinlifter on the car east of the opening. That was the only pinlifter available to the deceased or to Stogner without going around the train or over or under the cars. And we may here observe that it is well settled that "the statute does not contemplate that railroad employees should be required to go around, over or under the cars in order to operate the coupler from the other side on the adjacent car" (2 Roberts, Federal Liabilities of Carriers, Second Edition 1214, Section 625).

And if the minds of reasonable men may differ as to whether Stogner's testimony warrants the inference that the pinlifting device was inoperative, so as to make it necessary to open the knuckle by hand, then the question whether appellant violated the Act in failing to equip its cars as the Act requires, was one for the jury. And we respectfully say that the course this case has taken in the court below and in this Honorable Court should, we think, suffice to demonstrate beyond peradventure that that matter was at least one as to which the minds of reasonable men may differ. The learned District Judge and twelve jurors, presumably intelligent, reasonable men, concluded that Stogner's testimony sufficed to warrant the inference that this coupling device was out of order and inefficient. And in the first decision rendered herein by this Honorable Court, on November 1, 1940, three members of the Court were obviously of the same opinion, for the Court unanimously held that the question was one for the jury.

In Gulf C. & S. F. Ry. Co. v. Ellis (8th Cir.), 54 Fed. 481, the action was one to recover the value of a mare and a filly run down and killed by the defendant's train. Under the circumstances it was the duty of the defendant's engineer, as the Court held, to keep a lookout for stock upon

the track which, at the place in question, was straight and level for a half a mile or more in either direction. The plaintiff adduced no direct evidence as to what occurred, but there was testimony that the footprints of the filly showed she had run on the track, ahead of the engine, two hundred yards or more before being overtaken and killed. There was no evidence to show that the train could have been stopped in a distance of 200 yards. However, this Court, through a former distinguished Judge thereof, Judge Caldwell, ruled that there was sufficient proof of circumstances to warrant the inference that the defendant's engineer was negligent in failing to avert the injury by slackening the speed of the train, and the Court (54 Fed., 1.c. 484, 485) said:

"But the case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. Railway Co./v. Cox, 145 U. S. 593, 606, 12 Sup. Ct. Rep. 905. And in cases involving the question of negligence, the rule is now settled that 'when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. * * * The presumption is that jurors are reasonable men and that the trial judge is a reasonable man, and when the judge and jury who tried the cause concur in the view that the evidence establishes negligence, every presumption is in favor of the soundness of that conclusion." (Emphasis ours.)

And it is not without significance that appellant, at the trial below, stood mute and offered not one word of testimony as to the condition in which it found this coupling device after the casualty. It is altogether fair to assume that after the casualty the usual examination or inspection was made of this coupling device by appellant. Certainly appellant had every opportunity to inspect and test it, and

it was its duty so to do. And had it found the same in good operative condition it would undoubtedly have adduced testimony to that effect, as was done in Terminal R. Assn. v. Kimbrel, supra, 105 Fed. 262, and as has been done in many other cases. But appellant declined to offer any testimony on that subject.

It is a trite rule of law, one that was early established in England and that has always had the sanction of our courts, both federal and state, that the failure of a party to produce evidence of matters peculiarly within his knowledge affords a presumption that such evidence, if produced, would operate unfavorably to him. Kirby v. Tallmadge, 160 U. S. 379, 40 L. Ed. 463; Runkle v. Burnham, 153 U. S. 216, 225, 38 L. Ed. 694; Graves v. United States, 150 U. S. 120, 37 L. Ed. 121; Clifton v. United States, 4 How. 242, 244, 11 L. Ed. 957; Choctaw & M. R. Co. v. Newton, 140 Fed. 225, l. c. 238; Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, 483; Pullman Company v. Cox (Tex. Civ. App.), 120 S. W. 1058, l. c. 1066.

In Choctaw & M. R. Co. v. Newton, supra (140 Fed. 225, l. c. 238), this Court said:

"Where a party has the means of producing testimony within his knowledge or keeping upon a material question involved in the case, and fails to do so, the presumption arises that the fact is against him." (Citing Gulf etc. Ry. Co. v. Ellis, supra, 54 Fed. 481, and decisions of the Supreme Court of the United States which we have cited above.)

In Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, from which we have quoted above, where the plaintiff's case rested wholly upon inferences to be drawn from the facts in evidence, the defendant did not produce its engineer as a witness. This Court said:

"The circumstantial evidence in the case is ren-

dered more cogent, if not conclusive, by a well-settled rule of evidence. The facts in the matter in dispute rested peculiarly within the knowledge of the defendant, and it had in its power to show, by its engineer, what they were, and declined to do so. Now, it is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justifled in acting upon that conclusion. It is certainly a maxim,' said Lord Mansfield, 'that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.' Blatch v. Archer, Cowp. 63, 65. It is said by Mr. Starkie, in his work on Evidence, vol. 1, p. 54:

"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice." (Emphasis ours.)

The Court has inadvertently overlooked and failed to apply this familiar rule, though no record could well present a situation calling more strongly for the application thereof.

We do not, of course, contend that a case will be made for the jury as for a violation by a defendant carrier of the Safety Appliance Act without any proof warranting an inference that the act was violated, though the defendant comes forward with no evidence. But this is not such a case. From Stogner's testimony that he went between the cars and opened the knuckle by hand, though it is not necessary to open a knuckle by hand if the pinlifter is working, followed by his testimony that he tried to use the pinlifter, the inference naturally arises that the pinlifter was inefficient and inoperative. In our judgment that evidence needed no strengthening in order to make out a case for the plaintiff; but it is greatly strengthened by the failure of appellant to produce any evidence as to the condition of this coupling device, a matter peculiarly within its knowledge, constituting "a potent circumstance against it" (Pullman Company v. Cox, supra, 120 S. W., l. c. 1060), and operating to leave no room for doubt that the question of appellant's violation of the act was one for the jury.

For the reasons stated above, we earnestly pray that the Court grant appellee a rehearing of this cause.

Respectfully submitted,

CHARLES M. HAY, CHARLES P. NOELL, WM. H. ALLEN, Attorneys for Appellee.

Certificate of Counsel.

Charles M. Hay, Charles P. Noell and Wm. H. Allen, counsel of record for appellee in the above-entitled cause, do hereby certify that the above and foregoing petition of appellee for a rehearing of said cause is filed in good faith and is believed by them to be meritorious.

CHARLES M. HAY, CHARLES P. NOELL, WM. H. ALLEN,

Attorneys for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 29, 1941.

[fol. 472] (Order Denying Petition of Appellee for Rehearing.)

May Term, 1941.

Wednesday, May 7, 1941.

The petition for rehearing filed by counsel for the appellee having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

May 7, 1941.

[fol. 473] (Motion of Appellee to Stay Mandate, etc.)

To the Honorable United States Circuit Court of Appeals in and for the Eighth Judicial Circuit, or any Judge thereof;

Comes now the appellee in the above entitled cause and states that appellee desires to apply to the Supreme Court of the United States for a writ of certiorari to review the decision of the Court in said cause, as shown by the Court's opinion rendered herein on April 14, 1941, and moves and prays that an order be made staying and withholding the mandate of this Court in said cause pending appellee's said application for said writ, in accordance with the Rules of this Court in such cases made and provided.

Respectfully submitted,

CHARLES M. HAY, CHARLES P. NOELL, WM. H. ALLEN, Counsel for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 13, 1941.

[fol. 474] (Order Staying Issuance of Mandate.)

May Term, 1941.

Thursday, May 15, 1941.

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 15, 1941.

- [fol. 475] (Praecipe for Transcript for Supreme Court on Application for Writ of Certiorari.)
- To Hon. E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit, St. Louis, Missouri:

Please incorporate the following into the record to be certified to the Supreme Court of the United States on Appellee's application to that Court for a Writ of Certiorari to this Court in the above entitled cause, namely:

- 1. The printed transcript of the record.
- 2. Appearances of Counsel.
- 3. Record entry showing argument and submission of the cause on March 15, 1940, before Judges Sanborn, Thomas and Van Valkenburgh.
- 4. Order of July 24, 1940, substituting Clarence A. Stewart as Administrator of the Estate of John B. Stewart, deceased, as appellee.
- 5. Opinion of the Court by Judge Van Valkenburgh on November 1, 1940.
- 6. Judgment of the Court on November 1, 1940, in accordance with opinion of that date.
- 7. Appellant's Petition for a Rehearing filed November 15, 1940.
- 8. Appellee's Petition for a Rehearing filed November 15, 1940.

[fol. 476] 9. Order of December 7, 1940, granting both of said petitions for rehearing and vacating, setting aside and holding for naught judgment entered November 1, 1940.

- 10. Record entry showing argument and submission of cause before Judges Gardner, Sanborn and Thomas on March 10, 1941.
- 11. Opinion of the Court by Judge Gardner rendered on April 14, 1941.
- 12. Judgment of the Court of April 14, 1941, in accordance with the opinion of that date.
- 13. Appellee's Petition for Rehearing filed April 29, 1941.
- 14. Order of May 7, 1941, denying appellee's petition for a rehearing.
- 15. Motion of Appellee to stay mandate, filed May 13, 1941.
 - 16. Order of May 15, 1941, staying mandate.

Respectfully,

CHARLES M. HAY, CHARLES P. NOELL, WM. H. ALLEN, Counsel for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 23, 1941.

[fol. 477] (Clerk's Certificate.)

United States Circuit Court of Appeals Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk,

and full, true and complete copies of the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellee, in a certain cause in said Circuit Court of Appeals wherein the Southern Railway Company, a Corporation, was Appellant, and Clarence A. Stewart, Administrator of the Estate of John R. Stewart, Deceased, was Appellee, No. 11,609, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 28th day of May, A. D. 1941.

(Seal)

E. E. KOCH, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[fol. 478] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIOBARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7560)



FILE COPY

FILED

JUN 13 1941.

CHARLES SLWOOF RAD

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

of the Estate of John R. Stewart,
Deceased,
Petitioner,

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of ied No. 161

SOUTHERN RAILWAY COMPANY, a Corporation,

Respondent.

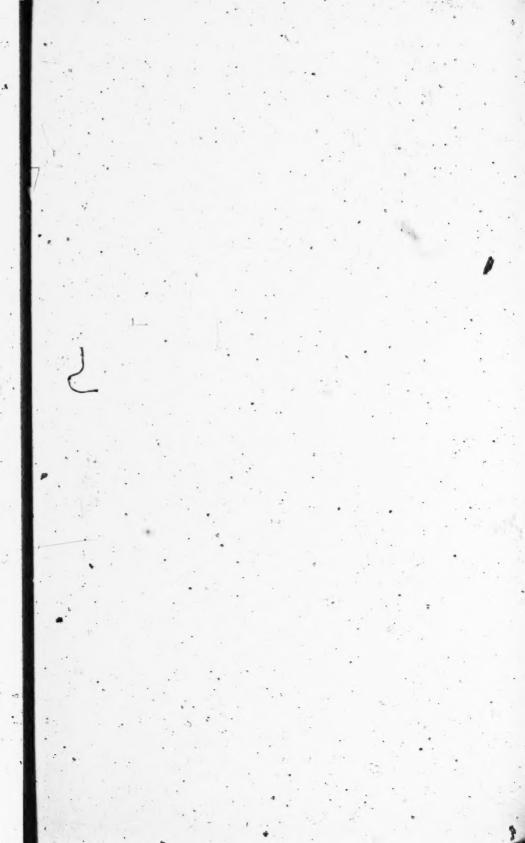
PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit,

and

BRIEF IN SUPPORT THEREOF.

CHARLES M. HAY,
WILLIAM H. ALLEN,
CHARLES P. NOELL,
Counsel for Petitioner.



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Cases Cited.

Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419
Baltimore & Potomac Railroad Co. v. Landrigan, 191 U. S. 461, l. c. 474, 48 L. Ed. 262
Chicago & Rock Island Ry. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1205
Choctaw & M. R. Co. v. Newton, 140 Fed. 225, l. c. 238
Clifton v. United States, 4 How. 242, 244, 11 L. Ed. 957
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Lang v. New York Central R. Co., 255 U. S. 455, 65 L. Ed. 729
Lumbia v. United States, 290 U. S. 551, 553, 78 L. Ed. 492
Miller v. Union Pacific Railroad Co., 290 U. S. 227, l. c. 233, 78 L. Ed. 285
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	San Antonio & Arkansas Pass Ry. Co. v. Wagner, 241 U. S. 476, l. c. 485, 60 L. Ed. 1110
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	Worthington v. Elmer, 207 Fed. 306, 309
	Yazoo & M. B. Railroad Co. v. Cockerham, 134 Miss. 887, 99 So. 114
	Statutes Cited.
	28 U. S. C. A., Sec. 347 8
	45 U. S. C. A., Sec. 2, Act of March 2, 1893, c. 196,
	Sec. 2, 27 Stat. 531, as amended by Act of March 2, 1903, 32 Stat. 943, c. 976
	45 U. SC. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65
	45 U. S. C. A., Sec. 53, Act of April 22, 1908, c. 148, Sec. 3, 35 Stat. 66
	Textbook Cited.
,	Webster's International Dictionary 29
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased,

Petitioner,

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SOUTHERN RAILWAY COMPANY, a Corporation,

Respondent.

No. . .

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals rendered and entered on the 14th day of April, 1941, in this case, lately pending in said United States Circuit Court of Appeals for the Eighth Circuit, styled Southern Railway Company, a corporation, appellant, v. Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, appellee, being cause No. 11,609 of civil causes on the docket of said United

States Circuit Court of Appeals for the Eighth Circuit, reversing a judgment of the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, in said cause, in favor of your petitioner and against respondent herein.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in said cause of Southern Railway Company, a corporation, appellant, v. Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, appellee, which petitioner here seeks to have reviewed, appears on pages 436 to 444, inclusive, of the printed transcript of the record filed herewith and is reported in 119 Fed. (2) at page 85. A former opinion of said United States Circuit Court of Appeals for the Eighth Circuit in said cause, which was thereafter vacated and set aside, appears on pages 402 to 411, inclusive, of the printed transcript of the record filed herein and is reported in 115 Fed. (2) at page 317.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by Mary Stewart, administratrix of the estate of John R. Stewart, deceased, on April 20, 1937, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri against respondent under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), to recover for the alleged wrongful death of said deceased, resulting from injuries sustained by him while in the employ of respondent as a brakeman and alleged to have been proximately caused by the violation by respondent of Section 2 of the Federal Safety Appliance Act (45 U. S. C. A., Sec. 2, Act of March 2, 1893,

c. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2. 1903, 32 Stat. 943, c. 976) in failing to have its cars, moving in interstate commerce, equipped with couplers coupling automatically by impact without the necessity of men going between the ends of the cars.

As appears from the evidence and proceedings at the trial of said cause in said District Court, before the Court and a jury, John R. Stewart was injured on February 12, 1937 (R. 26), and died on February 14, 1937, as the result of such injuries (R. 56). When injured he was a member of respondent's switching crew engaged in coupling certain freight cars on track No. 12 in the "Kotman Yard" in East St. Louis, Illinois (R. 26, 27). Respondent is, and at the time of Stewart's injury was, a common carrier by railroad engaged in interstate commerce, and Stewart, at the time of his injury, was employed by respondent in such commerce (R. 50, 52, 53, 70, 71). Track No. 12 in said yard extended east and west and was a straight track (R. 27, 28). Seventeen cars had been placed on this track to be coupled together (R. 70, 71, 27). The engine was headed west, with all of the cars east of the engine (R. 28). Prior to Stewart's injury seven or eight of the cars, those nearest the engine, had been coupled together and were attached to the engine (R. 27). A car is about 40 feet long The switchmen worked on the north side of this (R. 44). track, the engineer's side. Stewart, a switchman of twenty years experience (R. 59), received his fatal injuries when he went between the ends of two of the cars to effect a coupling between them by hand, that is, when he went between the last or easternmost car of the seven or eight cars that had been coupled together and were attached to the engine and the car immediately east thereof, referred to as the "east car," to open by hand the knuckle of the coupler of said east car (R. 29, 45).

Martin, respondent's engineer in charge of this switch engine, called as a witness for the plaintiff at the trial in

said District Court, testified that Stewart had been coupling these cars, working on the north side of track No. 12, and on this occasion walked back and gave Martin a back-up signal; that he (Martin) backed up his engine until he received a stop signal from Stewart, whereupon he stopped, set his brake and remained stationary; that Stewart then went between the cars, and a little later he heard Stewart holler, and then received a "slack ahead" signal from the foreman, Stogner, that is, a signal to move west, which he did (R. 44, 45). When asked if he paid any attention to whether or not Stewart used the pinlifter before he went in there, he said he did not notice him; that as an engineer what he did all the time was to look out for signals (R. 46).

Stogner, the foreman of respondent's switching crew, who had been in respondent's employ as a switchman for more than sixteen years (R. 26) called as a witness for the plaintiff, testified that the casualty occurred about 5:40 p. m., and that it was about dusk (R. 27); that he was eighty or ninety feet east of Stewart when the latter was injured, Stewart being between him and the engine (R. 28). He heard St wart "holler," ran to him and found him with his arm caught between the couplers of the two cars. He said the knuckles on the couplers of both the cars were closed (R. 29). He testified that the pinlifter is used to open the knuckle; that cars cannot be coupled if both knuckles are closed, but can be coupled if both knuckles are open or if only one knuckle is open; that this is done by the switchman on the outside of the car with the pinlifter; that you get the lever and jerk the lifter and it kicks open (R. 31), but if you are unable to get it open with a pinlifter you go between the cars and open the knuckle by hand; that the pinlifter is operated with the left hand, because you have to face the car to do your work (Be 33). He testified that after Stewart's

injury be coupled together the two cars between which Stewart was injured, and that to do so he went between them and opened the knuckle by hand (R. 34). He said that if the pinlifter is working automatically it is not necessary to go in between the cars to open the knuckle by hand (R. 34). He further testified that the pinlifter on the east car was on the north side of the car, at the northwest corner thereof (R. 39) and was the only pinlifter on the north side; the pinlifter on the west car being on the south side (R. 37, 43); that they were working on the north side, and to make the coupling the man would stand on that side and work the lever of the pinlifter of the east car to open the knuckle (R. 39); that he would not have to go inside if it worked right; that the only thing that would require him to go in there is that it would not work right (R. 40). He said he did not know whether Stewart tried to use the pinlifter, as he was not watching Stewart (R. 43). He further testified that immediately preceding Stewart's injury he heard some cars hit right at him; that the noise came from the east end of the train (R. 50). On cross-examination Stogner was asked by respondent's counsel which pinlifter he tried to use, and he said he tried to use the pinlifter on the north side, the pinlifter on the east of the opening (R. 36).

At said trial respondent, defendant in said cause, introduced no evidence as to whether the pinlifter on said "east car" was in operative, working condition so as to enable a switchman, by use thereof, to open the knuckle of the coupler of that car without the necessity of going between the ends of the cars.

The trial of said cause in said District Court resulted in a verdict and judgment, on June 13, 1939, in favor of the plaintiff and against respondent in the sum of \$17,500.00 (B. 345, 346). Thereafter respondent, in due course, appealed said cause to the United States Circuit Court of

Appeals for the Eighth Circuit, where said appeal was duly perfected and said cause was, on March 15, 1940, argued and submitted by counsel (R. 401). Thereafter Mary Stewart died, and on July 24, 1940, said Court of Appeals duly made and entered an order substituting Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, as appellee in said cause (R. 401).

Thereafter, on November 1, 1940, said Court of Appeals, in an opinion filed in said cause on said day, ruled that the evidence adduced at said trial sufficed to warrant the submission of the case to the jury, and that respondent's motions for a directed verdict and for a verdict non obstante veredicto were properly overruled, but held that said District Court erred in charging the jury (R. 402). And on said November 1, 1940, said Circuit Court of Appeals duly entered judgment in said cause in accordance with said opinion, reversing the judgment therein and remanding the cause to the District Court for a new trial (R. 412).

Thereafter, on November 15, 1940, within the time allowed by the rules of said Court of Appeals, petitioner and respondent each filed a petition for a rehearing of said cause in said Court of Appeals (R. 413, 423), and thereafter, on December 7, 1940, said Court of Appeals, by an order made and entered of record, sustained both of said petitions for a rehearing, and vacated, set aside and held for naught said judgment entered in said cause on November 1, 1940 (R. 435).

Thereafter, on March 10, 1941, said cause was again argued by counsel before said Court of Appeals and duly submitted to said Court (R. 435). Thereafter, on April 14, 1941, said Court of Appeals, in an opinion filed in said cause on said day, the opinion which petitioner here seeks to have reviewed (R. 436), ruled, in substance, that it was the duty of the deceased to use the pin lifter for opening

the knuckle of the east car; that there was no evidence that he did so; that the burden was upon the plaintiff to so show, and that because of the lack of direct proof that the deceased tried to use pin lifter before going between the cars no recovery could be had; that there was no substantial evidence tending to show that the pin lifter was defective, inefficient or inoperative; that there was no evidence to warrant a finding that the injury and death of the deceased proximately resulted from any failure on the part of respondent to equip its cars with couplers that would couple automatically by impact without the necessity of men going between the ends of the cars, and that the verdict was not sustained by substantial evidence, but rested upon conjecture and surmise (R. 436-444).

And said Court of Appeals, by its said opinion in said cause filed on April 14, 1941, ordered that the judgment appealed from be reversed and the cause remanded with directions to said District Court to grant respondent's motion for judgment in its favor notwithstanding the verdict. And on the same day judgment was entered in said cause by said Court of Appeals in accordance with said opinion (R. 444).

Thereafter, on the 29th day of April, 1941, and within the time allowed by the rules of said Court of Appeals, petitioner duly filed in said cause in said Court of Appeals his petition for a rehearing of said cause (B. 445).

And thereafter, on May 7, 1941, petitioner's said lastmentioned petition for a rehearing was by said Court of Appeals overruled (R. 469), on which day the judgment of said Court of Appeals in said cause became final.

The duly certified record, including all of the proceedings in said cause in said United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and in said United States Circuit Court of Appeals for the Eighth Circuit, is filed herewith under separate cover.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28, U. S. C. A., Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Courts of Appeals. The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on April 14, 1941 (R. 444). A petition for a rehearing was duly filed by this petitioner, appellee in said Circuit Court of Appeals, on April 29, 1941, within the time provided by the rules of said Circuit Court of Appeals (R. 445), and said petition for a rehearing was denied by said Circuit Court of Appeals on May 7, 1941 (R. 469).

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for writ of certiorari are:

(1) Whether, in an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), for the death of a switchman employed in interstate commerce, resulting from injuries sustained by him while between two freight cars trying to open the knuckle of the coupler of one of them by hand in order to prepare the coupler for coupling by impact, it being charged that such injuries were proximately caused by the failure of his employer, an interstate carrier by railroad, to equip its cars with couplers coupling automatically by impact, without the necessity of men going between the cars, as required by Section 2 of the Safety Appliance Act (45 U.S. C. A., Sec. 2, Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2, 1903, 32 Stat. 943, c. 976), the plaintiff, in order to make a case for the jury, must adduce the testimony of

an eyewitness to the casualty affirmatively showing that the deceased employee tried to open the knuckle by operating the lever of the pinlifter at the side of the car before going between the cars to open the same by hand, though evidence be adduced to support a finding that the pinlifter was not in efficient working order.

- (2) Whether, in an action for the death of a switchman resulting from injuries sustained by him in a switching operation while between cars trying to open a knuckle by hand, alleged to have been proximately caused by the failure of the defendant railroad company to equip its cars with couplers coupling automatically by impact without the necessity of men going between the cars, as required by Section 2 of the Safety Appliance Act, it will be presumed, in the absence of evidence to the contrary, that the deceased employee did not subject himself to the risk of injury by going between the cars to open the knuckle by hand without first having tried to use the pinlifter for that purpose.
- (3) Whether, in an action upon the Federal Employers' Liability Act for the death of a switchman, resulting from injuries sustained by him in a coupling operation and alleged to have been proximately caused by the failure of the defendant railroad company to equip its cars with couplers coupling automatically by impact without the necessity of men going between the ends of the cars, undisputed testimony adduced by the plaintiff that the deceased went between two freight cars for the purpose of effecting a coupling between them and sustained fatal injuries while trying to open the knuckle of a coupler by hand, and undisputed testimony of the foreman of the crew that shortly after the casualty he coupled these cars together, and that to do so he went between them and opened the knuckle by hand, that it is not necessary to go between cars to open a knuckle by hand if the pin lifter is working, and that he

tried to use the pin lifter, sufficed to support a finding by a jury that said pin lifter was defective or inefficient and not in compliance with the automatic coupler provision of the Safety Appliance Act.

(4) Whether, under the undisputed evidence in this case, as shown by petitioner's summary statement of the matter involved, supra, the jury was warranted in finding, as it did, that the injury and death of plaintiff's intestate, John R. Stewart, was proximately caused by the failure of respondent to have and keep its cars equipped with couplers coupling automatically by impact without the necessity of men going between the ends of the cars as required by Section 2 of the Safety Appliance Act.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In this case the United States Circuit Court of Appeals for the Eighth Circuit, by its last opinion herein, rendered on April 14, 1941, decided an important question of federal law which has not been, but should be, settled by this Court, namely: In an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), for the death of an employee employed in interstate commerce, resulting from injuries sustained by him in a coupling operation while between freight cars trying to open the knuckle of the coupler of one of them by hand, alleged to have been proximately caused by the failure of his employer, an interstate carrier by railroad, to equip its cars with couplers coupling automatically by impact without the necessity of men going between the cars as required by Section 2 of the Safety Appliance Act' (45 U.S. C. A., Sec. 2, Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2, 1903, 32 Stat. 943, c. 976), wherein evidence is adduced supporting a finding that the pin lifter, designed to enable an

employe to open the knuckle without the necessity of going between the cars, was, in fact, not in efficient working condition, making it necessary to go between the cars to open the knuckle by hand, must the plaintiff, in order to make a case for the jury, adduce the testimony of an eyewitness to the casualty affirmatively showing that the deceased tried to use the pin lifter before going between the cars to open the knuckle by hand? In the instant case said Court of Appeals held that it was the duty of Stewart, the deceased employee, to try to use the pin lifter before going between the cars, and that the burden was upon the plaintiff to show that he did so, and held, in substance, that, regardless of what might otherwise be the nature or character of the evidence, the plaintiff could not recover because of the failure to adduce direct proof that the deceased performed such duty. The question so decided is an important one of federal law which has not been expressly decided by this Court, and which, petitioner believes, should be decided by this Court.

- (2) There being no evidence lawfully tending to show that the deceased did not try to use the pinlifter before going between the cars to open the knuckle by hand, the ruling of the Court of Appeals in this case, denying a recovery upon the ground that it was not affirmatively shown that the deceased performed the duty said to have rested upon him to try to use the pinlifter before going between the cars, is contrary to the principle firmly established by this Court that, in the absence of evidence to the contrary, a deceased will be presumed to have performed whatever duty may have rested upon him under the circumstances attending his death.
- (3) In this case petitioner adduced undisputed testimony that the deceased, Stewart, went between the cars for the purpose of effecting a coupling between them and sustained his fatal injuries while trying to open the

knuckle of the coupler of the "east car" by hand, and the undisputed testimony of respondent's foreman, Stogner, that shortly after Stewart's fatal injury he coupled together the cars that Stewart was attempting to couple when injured and that to do so he also went between the cars and opened said knuckle by hand, that it is not necessary to go between cars to open a knuckle by hand if the pinlifter is working, and that he tried to use the pinlifter. Respondent offered no evidence as to the condition of the pinlifter. Nevertheless, said Court of Appeals ruled that the finding of the jury that the pinlifter was not in efficient working order was not supported by substantial evidence. In so ruling the Court of Appeals usurped the function of the jury, and its said ruling is in conflict with many decisions of this Honorable Court and of the Court of Appeals in other circuits holding that, on the question whether a case is one for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is one of fact for the jury.

(4) The testimony of the foreman, Stogner, shows that shortly after the casualty, in undertaking to couple these cars, he tried to use this very pinlifter but found that it would not function, and that to effect a coupling he had to go and did go between the cars to open the knuckle by hand—the very evil against which the automatic coupler provision of the Safety Appliance Act is directed. And the ruling of said Court of Appeals that such testimony constituted no substantial evidence of the failure of

respondent to equip its cars with couplers coupling automatically by impact without the necessity of men going between the ends of the cars is in conflict with the decisions of this Court and of the courts of appeals in other circuits holding that the test of the observance of the duty placed upon a carrier by the automatic coupler provision of the Safety Appliance Act is the performance of the appliance; that proof of the failure of a coupling appliance to function efficiently at any time, so as to enable a coupling to be effected without the necessity of going between the ends of the cars, warrants a finding that such appliance was defective or inefficient and not in compliance with the act.

(5) The decision of said Court of Appeals in this case, by its said last opinion herein, that, as a matter of law, the evidence failed to show that the injury and death of the deceased proximately resulted from the violation by respondent of said automatic coupler provision of Section 2 of the Safety Appliance Act is not in accord with the applicable decisions of this Court holding that the true rule is that what is the proximate cause of an injury is ordinarily a question for the jury to be determined as a fact in view of the circumstances attending it and that it is only where, under the evidence, reasonable minds could draw but one conclusion, that the question of proximate cause becomes one of law.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit to the end that the judgment of said Court of Appeals in said cause of Southern Railway Company, a corporation, Appellant, v. Clarence A. Stewart, Administrator of the Estate of John

R. Stewart, Deceased, Appellee, No. 11,609, be reviewed by this Court, as provided by law, and that upon such review the judgment of said Court of Appeals in said cause, of date April 14, 1941, be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

CHARLES M. HAY,

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CHARLES P. NOELL,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The last opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the cause of Southern Railway Company, a corporation, appellant, v. Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, appellee, filed on April 14, 1941, appears on pages 436 to 444 of the printed transcript of the record filed herewith, and is reported in 119 Fed. (2), at page 85. A former opinion of said Court of Appeals in said cause rendered on November 1, 1940, which was thereafter vacated and set aside, appears on pages 402 to 411, inclusive, of the printed transcript of the record filed herewith, and is reported in 115 Fed. (2), at page 317.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts, on the points involved, in the course of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Eighth Circuit, in its last opinion filed in this cause on April 14, 1941, erred:

(1) In holding that the evidence adduced at the trial of the cause in the District Court on the issue of respondent's liability for the injury and death of plaintiff's decedent, John R. Stewart, as for a violation by respondent

of the automatic coupler provision of the Safety Appliance Act, did not make that issue one for the jury.

- (2) In holding that in no event may a recovery be had because of the violation of the automatic coupler provision of the Safety Appliance Act for the death of an employee resulting from fatal injuries sustained by him while between two cars attempting to open the knuckle of a coupler of one of them by hand, unless the testimony of an eyewitness to the casualty be adduced affirmatively showing that the deceased employee, before going between the cars to open the knuckle by hand, tried to open it by using the pinlifter at the side of the car.
- (3) In holding that the undisputed testimony that the deceased sustained his fatal injuries in a coupling operation, while between two freight cars trying to open the knuckle of one of them by hand, and the undisputed testimony of respondent's foreman that shortly thereafter he coupled those cars together, that to do so he went between the cars and opened this very knuckle by hand, though it is not necessary to go between cars to open a knuckle by hand if the pinlifter is working, and that he tried to use the pinlifter, did not suffice to warrant the jury in finding that said pinlifter was not in efficient working order.
- (4) In holding that the evidence adduced in this case did not support the finding by the jury that the injury and death of the deceased employee proximately resulted from the failure of respondent to have and keep its cars equipped with couplers coupling automatically by impact without the necessity of men going between the cars.

SUMMARY OF THE ARGUMENT.

I

The evidence adduced by the plaintiff at the trial of this cause in the District Court on the issue of respondent's liability for the injury and death of John R. Stewart as for a violation by respondent of the automatic coupler provision of the Safety Appliance Act sufficed to make that issue one for the jury, and the Circuit Court of Appeals erred in holding that the plaintiff was not entitled to have that issue submitted.

(A)

The ruling of the Court of Appeals that in no event may a recovery be had because of the violation of said automatic coupler provision of the Safety Appliance Act for the death of an employee whose fatal injuries were sustained while between two freight cars attempting to open the knuckle of the coupler of one of them by hand, unless the testimony of an eyewitness to the casualty be adduced affirmatively showing that the deceased performed the duty said to have rested upon him to try to open the knuckle by using the pin lifter at the side of the car before going between the cars is not supported by reason or authority.

(1)

While the question so ruled by said Court of Appeals has not, it seems, been expressly decided by this Court, courts that have expressly decided the same have held that where, as in this case, there is evidence that the deceased employee was crushed between cars while trying to open a knuckle by hand in order that a coupling by impact might be made, and evidence tending to show that the only available pin lifter was not in efficient working order, a recovery may be had for the death of such employee, as for a violation of the automatic coupler provision of the Safety Ap-

pliance Act, though the plaintiff be unable to produce the testimony of an eyewitness to the casualty that the deceased tried to use the pin lifter before going between the cars.

Hurley v. Illinois Central Railroad Co., 133 Minn. 101, 157 N. W. 1005; Yazoo & M. B. Railroad Co. v. Cockerham, 134 Miss. 887, 99 So. 114.

(2)

Said ruling of the Court of Appeals, denying a recovery on the ground that it did not affirmatively appear that the deceased employee performed a duty said to have rested upon him respecting the use or management of the coupling appliance, constitutes a plain disregard of the proviso to Section 53 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 53, Act of Apr. 22, 1908, c. 148, Sec. 3, 35 Stat. 66) providing "that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

San Antonio & Arkansas Pass Ry. Co. v. Wagner,
 241 U. S. 476, l. c. 485, 60 L. Ed. 1110;
 Spokane & Inland Empire R. Co. v. Campbell, 241
 U. S. 497, l. c. 510, 60 L. Ed. 1125.

(3)

In the absence of evidence to the contrary, a deceased will be presumed to have performed whatever duty may have rested upon him under the circumstances attending his death.

Baltimore & Potomac Railroad Co. v. Landrigan, 191 U. S. 461, l. c. 474, 48 L. Ed. 262; Miller v. Union Pacific Railroad Co., 290 U. S. 227, l. c. 233, 78 L. Ed. 285;

Travelers Ins. Co. v. McConkey, 127 U. S. 661, l. c. 667, 32 L. Ed. 308;

Worthington v. Elmer, 207 Fed. 306, 309;

New Aetna Portland Cement Co. v. Hatt, 231 Fed. 611, 617.

(B)

The undisputed testimony adduced by the plaintiff that the deceased sustained his fatal injuries in a coupling operation while between two freight cars, trying to open the knuckle of the coupler of one of them by hand, and the undisputed testimony of respondent's foreman that shortly thereafter he coupled those cars together, that to do so he went between them and opened the knuckle by hand, that it is not necessary to go between cars to open a knuckle by hand if the pin lifter is working, and that he tried to use the pin lifter, sufficed to warrant a finding by the jury that said pin lifter was not in efficient working order and that the injury and death of the deceased proximately resulted therefrom.

(1)

The ruling of said Court of Appeals that such undisputed testimony constitutes no substantial evidence that this coupling appliance was inefficient is not in accord with the applicable decisions of this Court holding that, on the question whether a case is one for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn therefrom; that it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly

draw different inferences or conclusions from the evidence, the question is one of fact for the jury.

> Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720; Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. e. 192, 193, 58 L. Ed. 906;

> New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;

Lumbra v. United States, 290 U. S. 551, 553, 78 L. Ed. 492;

Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419.

(2)

The failure of respondent to produce any evidence as to the condition of the pin lifter, a matter peculiarly within its knowledge, afforded the presumption that such evidence, if produced, would operate unfavorably to respondent and served to leave no room for doubt that the question of respondent's violation of the automatic coupler provision of the Safety Appliance Act was one for the jury.

Kirby v. Tallmadge, 160 U. S. 379, 40 L. Ed. 463; Runkle v. Burnham, 153 U. S. 216, 225, 38 L. Ed. 694;

Graves v. United States, 150 U. S. 120; 37 L. Ed. 121:

Clifton v. United States, 4 How. 242, 244, 11 L. Ed. 957;

Choctaw & M. R. Co. v. Newton, 140 Fed. 225, 1. c. 238;

Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, 483.

(3)

The test of the observance of the duty placed upon a carrier by the automatic coupler provision of the Safety Appliance Act is the performance of the appliance. Proof of the failure of a coupling appliance to function effi-

ciently at any time, so as to enable a coupling to be effected without the necessity of men going between the ends of the cars, warrants a finding that such appliance was defective or inefficient and not in compliance with the act.

Minneapolis & St. L. R. Co. v. Gottschall, 244 U. S. 66, 61 L. Ed. 995;

Lang v. New York Central R. Co., 255 U. S. 455, 65 L. Ed. 729;

San Antonio & Arkansas Pass Ry. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110;

Chicago & Rock Island Ry. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1205;

Philadelphia & Reading Ry. Co. v. Auchenbach, 16 Fed. (2) 550, 552, certiorari denied 273 U. S. 761;

Didinger v. Pennsylvania R. Co., 39 Fed. (2) 798; Detroit T. & I. R. Co. v. Hahn, 47 Fed. (2) 59.

(4)

The question of the proximate cause of Stewart's injury and death was one for the jury. What is the proximate cause of an injury is ordinarily a question for the jury to determine in view of the accompanying circumstances. A finding of the jury on the question of proximate cause must be allowed to stand unless all reasonable men, exercising unprejudiced judgment, would draw an opposite conclusion from the facts.

Milwaukee & St. Paul Railway Co. v. Kellog, 94 U. S. 469, l. c. 474, 24 L. Ed. 256;

Story Parchment Co. v. Patterson Co., 282 U. S. 555, l. c. 566, 75 L. Ed. 544.

ARGUMENT.

I

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), brought by the personal representative of John R. Stewart, deceased, to recover damages for the alleged wrongful death of said deceased, charged to have been proximately caused by the violation by respondent of Section 2 of the Safety Appliance Act (45 U. S. C. A., Sec. 2, 1893, c. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2, 1903, 32 Stat. 943, c. 976), in failing to have its cars equipped with couplers coupling automatically by impact without the necessity of men going between the cars.

The pertinent provisions of the Employers' Liability

"Every common carrier by railroad while engaging in commerce between any of the several States shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Said Section 2 of the Safety Appliance Act provides:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be

uncoupled without the necessity of men going between the ends of the cars."

Petitioner respectfully submits that the evidence adduced at the trial of the cause in the District Court on the issue of respondent's liability for the injury and death of Stewart as for a violation by respondent of the automatic coupler provision of the Safety Appliance Act fully sufficed to make that issue one for the jury, and that the Circuit Court of Appeals for the Eighth Circuit erred in holding that the plaintiff was not entitled to have that issue submitted.

It is undisputed that respondent and Stewart were both engaged in interstate commerce. At the time of Stewart's fatal injury he was in the employ of respondent as a switchman in its switching yard in East St. Louis, Illinois, and was undertaking to effect a coupling between two freight cars on track 12 in said yard, which extended east and west (R. 26, 27). Seventeen cars had been placed on this track to be coupled together (R. 70, 71, 27). The engine was headed west and seven or eight of the cars, those nearest the engine, had been coupled together and were attached to the engine (R. 28, 29). Stewart was coupling the cars, working on the north side of the track (R. 29). When it came to coupling to the next car to the east the engineer, in response to Stewart's signals, first backed up. eastwardly, and then stopped. He then saw Stewart go between the cars to be coupled together (R. 44, 45). While Stewart was between the cars, trying to open the knuckle of the coupler of the "east car" with his hands, the cars east of him were struck and moved westwardly, causing the couplers of the cars he was between to come together, crushing his arm between the couplers (R. 29, 50). The foreman, Stogner, who was about ninety feet east of him, heard him "holler," went to him and found that the knuckles of both couplers on those cars were still closed

and that Stewart's arm was caught between couplers (R. 28, 29). On his signal the engineer moved forward, westwardly, releasing Stewart (R. 45, 46). The only pin lifter available to Stewart, for opening one of the knuckles, was that on the north side of the "east car" designed for use in opening the knuckle of the coupler at the west end of that car. The lever of the pin lifter extended to the side of that car at the northeast corner thereof (R. 37, 39). Stogner was not watching Stewart and did not observe whether he tried to use this pin lifter before going between the cars (R. 43). The engineer, Martin, testified:

"Q. Did you pay any attenion to whether or not Stewart used the pin lifter before he went in there! A. I did not notice him.

Q. You did not notice? A. I did not notice him.

Q. As an engineer, what do you look out for all the time? A. Look out for signals" (R. 46).

After the casualty Stogner made the coupling between these cars (R. 34). His testimony in that connection will be referred to later in the course of the argument in support of petitioner's contention that such testimony sufficed to show that the pin lifter was not in efficient working order.

(A)

On the issue of respondent's liability for the injury and death of plaintiff's decedent, John R. Stewart, the only questions properly involved on the appeal of this case were whether the evidence adduced sufficed to warrant a finding by the jury that the pinlifter mentioned was not in efficient working order, and whether such inoperative condition thereof, if any, was the proximate cause of the injury and death of the deceased. However, the Circuit Court of Appeals for the Eighth Circuit, in its last opinion filed in the cause (R. 436-444), held that the plaintiff made no case

for the jury for the reason that it was the duty of the deceased to use the pinlifter in opening the knuckle on the car so as to prepare it for impact (R. 441); that there is no evidence that he did so (R. 441), and that the burden was upon the plaintiff to show that the deceased performed such duty (R. 442).

The ruling of the Court of Appeals, in this portion of its opinion, is not made to depend upon whether there was or was not evidence tending to show that the pinlifter was not in efficient working order as the plaintiff sought to show and which, for reasons to be hereafter noted, petitioner contends plaintiff did show by evidence rightfully engendering that conclusion. In substance, the Court of Appeals, in this portion of its said opinion, held that in no event may a recovery be had for the death of an employee of an interstate carrier by railroad, charged to have been proximately caused by the failure of the carrier to equip its cars with couplers coupling automatically by impact without the necessity of men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, supra, where it appears that the deceased sustained his fatal injuries while between two cars trying to open a knuckle by hand, unless testimony of an eyewitness to the casualty be adduced affirmatively showing that the deceased performed the duty, said to have rested upon him, of trying to open the knuckle by using the pinlifter before going between the cars to open the knuckle by hand.

Such ruling, we contend, is plainly unsound. So far as we are advised, the precise question has not been expressly decided by this Honorable Court. It is an important question of federal law, of great public interest, which, we submit, should be authoritatively decided by this Court. The decision of this question by the Court of Appeals in this case, if hereafter followed as a precedent, may well operate to cause a miscarriage of justice in many meritori-

ous death cases arising under the automatic coupler provisions of the Safety Appliance Act.

Said ruling of the Court of Appeals is, we submit, not supported by either reason or authority. Section 2 of the Safety Appliance Act, supra, places no duty, as such, upon an employee with respect to the use or management of an automatic coupling appliance. Whether it may be inferred or presumed that the deceased employee tried to open the knuckle by use of the pinlifter before going between the cars to open it by hand, is relevant only because of the bearing it may have upon the charge of the alleged breach of duty on the part of respondent to equip its cars with couplers of statutory requirement, and whether such breach of duty, if any, was the proximate cause of the injury and death of the deceased. So the Court of Appeals correctly held in its first opinion rendered in this case, written by his Honor, Judge Van Valkenburgh (R. 402, 408).

That a recovery may be had for the death of an employee who sustained fatal injuries while between cars trying to open a knuckle of a coupler by hand, where the evidence supports a finding that the coupling appliance did not meet the statutory requirement, though no direct proof be adduced that the deceased tried to use the pinlifter before going between the cars, is a proposition not without support in the adjudicated cases.

In Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005, the deceased, a switching foreman, sustained fatal injuries while between two cars trying to open the knuckle of a coupler by hand. An examination of the coupling apparatus after the casualty showed that the knuckle in question would not open by use of the pinlifter. Though no witness observed whether Hurley did or did not try to use the pinlifter before going between the cars, the Supreme Court of Minnesota held that the

case was one for the jury. The reasoning of the opinion is unanswerable.

In Yazoo & M. V. R. Co. v. Cockerham, 134 Miss. 887, 99 So. 14, the action was for the death of an employee alleged to have been caused by the violation by the defendant carrier of the duty placed upon it by the automatic coupler provision of the Safety Appliance Act, supra. In affirming a judgment for the plaintiff, the Supreme Court of Mississippi said:

"In many of the cases there was no defect shown in the coupling appliance save the fact that the injured employee attempted to manipulate the lever which for some reason failed to work. In the case at bar while the testimony is silent as to any attempt to manipulate the lever, yet the testimony of the plaintiff is to the effect that the coupling appliances would not at all times work by the usual and customary manipulation of the lever. We think the jury were warranted from this testimony in believing this appliance defective and that it was not necessary before a recovery may be had to prove that the employee attempted to use the lift lever on the defective coupling appliance." (Emphasis ours.)

This Court denied certiorari.

Yazoo & M. V. R. Co., Petitioner, v. Cockerham, Respondent, 265 U. S. 586, 68 L. Ed. 1193.

Said ruling of the Court of Appeals herein constitutes a plain disregard of the proviso to Section 53 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 53, Act of April 22, 1908, c. 148, Sec. 3, 35 Stat. 66), which is as follows:

"Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the viola-

tion by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The effect of said ruling of the Court of Appeals is to hold that no recovery may be had without direct proof that the deceased was not guilty of misconduct in failing to properly use or manage the coupling appliance; though such misconduct, if any, could be nothing more than contributory negligence which, by the proviso to Section 53 of the Employers' Liability Act, quoted above, is excluded from consideration. San Antonio & Arkansas Pass Ry. Co. v. Wagner, 241 U. S. 476, l. c. 485, 60 L. Ed. 1110; Spokane & Inland Empire R. Co. Campbell, 241 U. S. 497, l. c. 510, 60 L. Ed. 1125.

And the ruling of the Court of Appeals that, in order to recover, the plaintiff must adduce direct proof that the deceased, for his own protection, tried to use the pinlifter before going between the cars is contrary to the well established principle that, in the absence of evidence to the contrary, a deceased will be presumed to have exercised due care for his own safety, and to have performed whatever duty may have rested upon him under the circumstances attending his death. Baltimore & Potomac Railroad Co. v. Landrigan, 191 U. S. 461, l. c. 474, 48 L. Ed. 262; Miller v. Union Pacific Railroad Co., 290 U. S. 227, l. c. 233, 78 L. Ed. 275; Travelers Ins. Co. v. McConkey, 127 U. S. 661, l. c. 667, 32 L. Ed. 308; Worthington v. Elmer, 207 Fed. 306, 309; New Aetna Portland Cement Co. v. Hatt, 231 Fed. 611, 617.

Such presumption here prevails. There was no evidence to repel it or put it to flight. It is clear that the testimony of Martin, the engineer, constituted no evidence that Stewart did not try to use the pin lifter before going between the cars. In view of the distance that Martin was from Stewart, seven or eight cars, each forty

feet long, and the tender being between them (R. 27,-44), the fact that it was about dusk (R. 27), the fact that the pin lifter is operated by the left hand (R. 33), and the fact that when Stewart went to the opening between these cars he necessarily faced south, with his right side turned toward Martin, who was west of him, the latter had little or no opportunity to observe whether Stewart tried to operate the pin lifter; a matter as to which he was charged with no duty whatsoever. And he did not profess to know what Stewart did in that regard. When asked if he paid any attention to whether or not Stewart used the pin lifter, he said: "I did not notice him" (R. 46). A common meaning of the verb "to notice" is to "pay attention to" (Webster's International Dictionary). And in view of the form of the question propounded to Martin, his answer that he "did not notice him" could not well mean anything other than that he paid no attention to whether Stewart did or did not use the pin lifter; particularly when followed by the statement that what he did all the time was to look out for signals. And if such testimony be susceptible of any other interpretafion-which we respectfully dispute-then it was for the jury to say whether it constituted any evidence that Stewart did not use the pin lifter.

We submit that there was in this case no evidence of any probative force or effect tending to show that the deceased did not try to use the pin lifter before going between the cars, and that consequently the presumption that he did so arose as a matter of law. However, the District Court, in a charge that fully covered every feature of the case (R. 333-340), instructed the jury, in substance, that, in the absence of evidence to the contrary, the law presumes that Stewart used the pin lifter before going between the cars (R. 337). In Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, l. c. 473, 474, this Court approved the action of the lower court in

instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened before going across railroad tracks. This Court, after stating that "there are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to," said:

"The court did not tell the jury that all those who cross railroad tracks stop, look and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence."

Such was the course pursued in this case, and we submit that, under the circumstances, it was unduly favorable to respondent.

(B

The Court of Appeals, in its said last opinion herein, next ruled that there was no substantial evidence to warrant a finding by the jury that this pin lifter was not in efficient working order. In this, we submit, the Court of Appeals usurped the function of the jury, and its ruling is in conflict with the decisions of this Court, holding that on the question whether a case is one for the jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may fairly and reasonably be drawn from the evidence; that it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is one of fact for the jury. Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720; Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 192, 193, 58 L. Ed. 906; New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892; Lumbra v. United States, 290 U. S. 551, 553, 78 L. Ed. 492; Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419.

Stogner, an direct examination, testified that after Stewart had been removed he coupled together the cars that Stewart was trying to couple when injured, and that to do so he went between the cars and opened by hand the very knuckle that Stewart was trying to open by hand when injured (R. 34); that if the pinlifter is in working condition it is not necessary to go between the cars and open the knuckle by hand (R. 34); that the only thing that would require a man to go in there is that the pinlifter would not work right (R. 40).

On cross-examination Stogner was asked by respondent's counsel which pinlifter he tried to use, and he said he tried to use the pinlifter on the north side, the pinlifter on the car east of the opening (R. 36).

We submit that this testimony amply warranted the jury in finding that after the casualty this pinlifter was found not to be in efficient working order. Viewing this testimony in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference that may be fairly and legitimately drawn therefrom, it obviously warrants a finding that when Stogner undertook to couple these cars, almost immediately after the casualty, he first made an unsuccessful attempt to open the knuckle by use of the pinlifter; such an attempt as convinced him, an experienced switchman, that the pinlifter would not function and that to effect a coupling it was necessary for him to go between the cars, as he did, and open the knuckle by hand; the very evil against which the automatic coupler provision of the Safety Appliance Act is directed.

Indeed, Stogner's testimony on direct examination alone sufficed to warrant the inference that he was required to

go between the cars to open the knuckle by hand because he was unable to do so by means of the pinlifting device. Surely no jury would believe that a man in his senses. having freshly in mind the injuries received by Stewart while trying to open the knuckle by hand, would have incurred that very peril by going between the cars and using his hands to open the knuckle unless he had found that the pinlifting device, designed to avoid the danger of going between the cars, was inoperative so as to make such course necessary. And on cross-examination respondent's counsel, recognizing that such was the force of Stogner's testimony on direct examination, clinched the matter by asking Stogner which pinlifter he tried to use. And Stogner replied that he tried to use the one on the north side, which was on "the east car on the opening" (R. 36). This testimony fully warranted the triers of the fact in finding that this pinlifter was not in efficient working order. There is no valid basis for the holding of the Court of Appeals that this testimony, as a matter of law, is totally insufficient in probative force to sustain a finding that Stogner made a real, earnest effort to operate the pinlifter before going between the cars. For an experienced switchman to say that he tried to use a pinlifter, but went between the cars to open the knuckle by hand-the very thing the pinlifter is designed to avoid-plainly implies that he undertook to operate the pinlifter in the usual way, using such force as was necessary to determine whether it would operate, but was unable to get it to function.

It was the duty of the Court of Appeals, in ruling upon this matter, to view the evidence in the light most favorable to petitioner, and to accord petitioner the benefit of every inference that a jury might with propriety draw from such testimony. Gunning v. Cooley, 281 U. S. 90; Baltimore & Ohio Railroad Co. v. Groeger, 266 U. S. 521, 524, 527. This the Court did not do. The Court suggests that it does not appear whether Stogner's attempt to open the knuckle was successful, or whether this "try" to use the pin lifter came after the knacke was opened or before. But when Stogner said he tried to use the pin lifter—not that he used it—it could only mean that his attempt was unsuccessful. The word "tried" necessarily implies this. And certainly the only reasonable inference from Stogner's testimony is that his attempt to use the pin lifter was made before he had opened the knuckle by hand. After a knuckle has been opened, no purpose can be served by pulling on the lever of the pin lifter.

In its said former opinion herein the Court of Appeals said:

"We are asked to declare that, on the record before us, the motions of appellant for a directed verdict and for a verdict in its favor non obstante veredicto should have been sustained; but in view of that record, we cannot say that the inference might not reasonably have been drawn by the triers of the fact that there was probable cause to believe that the injury suffered was caused by the breach of duty charged" (R. 409).

Such ruling, we submit, was entirely sound.

It is not without significance that respondent, at the trial in the District Court, stood mute and offered not one word of testimeny as to the condition in which it found this coupling appliance after the casualty. Respondent had this coupling appliance in its possession and had every opportunity to inspect and test the pin lifter to see whether it was functioning efficiently. It is fair to assume that respondent did make an inspection and test thereof, for it was respondent's duty to investigate the cause of the casualty. But respondent did not see fit to offer a word of testimony touching that matter. It is a thoroughly established rule of law that the failure of a party to produce evidence of matters peculiarly within his knowledge affords

a presumption that such evidence, if produced, would operate unfavorably to him. Kirby v. Tallmadge, 160 U. S. 379, 40 L. Ed. 463; Runkle v. Burnham, 153 U. S. 216, 225, 38 L. Ed. 694; Graves v. United States, 150 U. S. 120, 37 L. Ed. 121; Clifton v. United States, 4 How. 242, 244, 11 L. Ed. 957; Choctaw & M. R. Co. v. Newton, 140 Fed. 225, l. c. 238; Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, 483. Here the failure of respondent to produce any evidence as to the condition of this coupling appliance, a matter peculiarly within its knowledge, served to leave no possible room for doubt that the question of respondent's violation of the Safety Appliance Act was one for the jury.

It is well settled that it is not necessary to show a specific defect in a coupling appliance. Stogner's testimony shows that this appliance would not function efficiently. The test of the observance of the duty placed upon a carrier by the automatic coupler provisions of the Safety Appliance Act is the performance of the appliance. The failure of a coupling appliance to function efficiently at any time, so as to enable a coupling to be effected without the necessity of men going between the ends of the cars, supports a charge that the act was violated. Minneapolis & St. P. R. Co. v. Gottschall, 244 U. S. 66, 61 L. Ed. 995; Lang v. New York Central R. Co., 255 U. S. 455, 65 L. Ed. 729; Detroit T. & I. R. Co. v. Hahn, 47 Fed. (2) 59, certiorari denied 283 U. S. 842; Philadelphia & Reading Ry. Co. v. Auchenbach, 16 Fed. (2) 550, 552, certiorari denied 273 U. S. 761; Didinger v. Pennsylvania R. Co., 39 Fed. (2) 798.

And under the evidence in this case, tending to show that it was found after the casualty that the pin lifter did not operate efficiently, making it necessary to open the knuckle by hand, and the evidence as to the circumstances under which Stewart met his death, with the inferences legitimately deducible therefrom, the jury was warranted in finding that Stewart went between the cars to open

knuckle by hand because it could not be opened by means of the pin lifter, and that such inoperative condition of the pin lifter was consequently the proximate cause of his injury and death. What is the proximate cause of an injury is ordinarily a question for the jury, to be determined as a fact in view of the circumstances of fact attending it. It is only where minds of reasonable men could draw but one possible conclusion from the evidence that the question of proximate cause becomes one of law for the Court. Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, l. c. 474, 24 L. Ed. 256; Story, Parchment v. Patterson Co., 282 U. S. 555, l. c. 566, 75 L. Ed. 544.

Petitioner therefore prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit rendered herein on the 14th day of April, 1941, be reversed.

Respectfully submitted,

CHARLES M. HAY.

WILLIAM H. ALLEN,

CHARLES P. NOELL, Counsel for Petitioner.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased,

Petitioner,

VS.

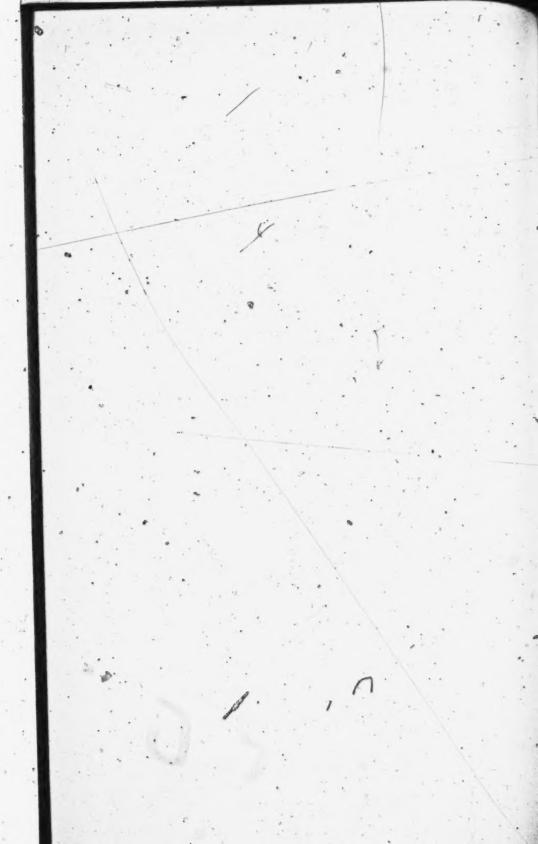
No. 161.

SOUTHERN RAILWAY COMPANY, a Corporation,

Respondent.

PETITIONER'S SUPPLEMENTAL STATEMENT, BRIEF AND ARGUMENT.

CHARLES M. HAY,
WILLIAM H. ALLEN,
CHARLES P. NOELL,
Counsel for Petitioner.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased,

Petitioner,

VS.

No. 161.

SOUTHERN RAILWAY COMPANY, a Corporation,

Respondent.

PETITIONER'S SUPPLEMENTAL STATEMENT, BRIEF AND ARGUMENT.

OPINIONS BELOW.

The last opinion below, of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on April 14, 1941, is reported in 119 Fed. (2) 85, and will be found in the printed record beginning on page 436.

A former opinion of that court in the case, rendered on November 1, 1940, is reported in 115 Fed. (2) 317, and will be found in the printed record beginning at page 402.

STATEMENT.

Inasmuch as respondent, in points three and four of its brief, contends that the judgment of reversal below is sustainable upon grounds not passed upon or considered by the Court of Appeals in its last opinion, petitioner makes the following statement of facts touching those matters.

Mrs. Mary Stewart, widow of John R. Stewart, deceased, resided in East St. Louis, Illinois. She was appointed administratrix of the estate of the deceased by the Probate Court of St. Clair County, Illinois, at Belleville, Illinois, on April 16, 1937 (R. 8, 65). On or about the same day she employed counsel, Mr. Noell, to handle her case (R. 113, 114). The suit was filed in the District Court in St. Louis, Missouri, on April 20, 1937. Before Mrs. Stewart employed counsel, defendant's claim agent, one Hahn, came to see her twice trying to effect a settlement; and he had one Reno see her for the same purpose, Reno telling her he had been a friend of her deceased husband (R. 115-117, 303). After the suit was filed Hahn continued to see Mrs. Stewart in East St. Louis and made efforts to settle the case, and followed her to Colterville, Illinois, for that purpose and tried to persuade her to take \$4,000.00, telling her that if she did not take it she would get nothing (R. 115-121). Subsequently, when she went on a visit to Hodgenville, Kentucky, in the summer of 1937, Hahn had a lawyer, one Hanley, see her in an effort to effect a settlement (R. 122-124, 303). She spent most of the summer in Kentucky, and upon returning went on a visit to Castleton, Illinois (R. 124, 125). Mrs. Stewart's son-inlaw, one Hamm, was employed in Illinois by the Terminal Railroad Association of St. Louis as a brakeman. spondent is one of the sixteen proprietary lines owning the Terminal (R. 148). Hahn, having failed to accomplish his purpose, went to Joseph F. Howell, general attorney

for the Terminal, at the latter's office in St. Louis and asked him to take a hand in the matter (R. 145, 146). Hahn said he went to Howell rather than to Hamm, because he thought that was the best way to handle it (R. 303); and he said "it worked, it worked all right" (R. 304). About a week later Howell called the Terminal's east side office by telephone and requested that Hamm be sent over to see him, and this was done (R. 147, 148). Howell testified that if one of the Terminal's proprietary carriers requested anything in his line that he could do for them, he did it (R. 148). He discussed with Hamm the matter of the settlement of Mrs. Stewart's case, and sent Hamm to see Bruce Campbell, one of respondent's counsel in East St. Louis (R. 148, 154). Thereafter, while Mrs. Stewart was at Castleton, Illinois, she received from her daughter, Mrs. Hamm, a telegram that had been sent by Hahn to her son-in-law, Hamm, telling Hamm that Compbell suggested that Hamm and Mrs. Stewart be at Hahn's office the following Thursday afternoon, saying it was important (R. 125). Mrs. Stewart then went to her daughter's home in East St. Louis. This was a few days before November 30, 1937, the date of the purported settlement. Mrs. Stewart talked with her son-in-law, Hamm, and her daughter, Mrs. Hamm, about the matter. Hamm told her he had been called to Howell's office in the legal department of the Terminal in St. Louis and had been told by Howell to see if he could not talk her into making the settlement, and had been told by Howell to go and see Campbell. Hamm said it meant his job, so he had better go and see Campbell and she had better talk with Campbell; that they were not hiring men of his age and he might lose his job (R. 172). He said he knew that his being called to the legal department of the Terminal had a meaning behind it (R. 249, 250); that it could only mean business; that they did not fool around inviting fellows over from work like that to have conversations with them; that they

did not have to make a threat, their being interested in it was enough (R. 251). Hamm told Mrs. Stewart, in Mrs. Hamm's presence, that he would like for her to settle the matter, that it would be a very good thing to do because of his being called in there; that it seemed that his company's interest was aroused toward this thing, and it would be the best thing, considering his position, to have Mrs. Stewart go down and settle the thing; that it was the only thing to do since he was concerned in it (R. 252, 253).

Mrs. Stewart testified that she knew that her son-in-law had been working for the Terminal for a long time; that if he should lose his job he might not get another one, and he had a family, a wife and two children to keep; that she was much worried, and thought if he would lose his job his wife and children would suffer (R. 173); and that Hamm was worried about his job (R. 181). She testified that she had never previously indicated to anybody that she would take \$5,000.00 (R. 174), but that when she arrived at this law office all of the papers were ready for a settlement on that basis (R. 185), and that she made up her mind to sign when she was told at this law office by Wiechert that her son-in-law could lose his job; that it could be done and had been done (R. 185). Mrs. Hamm testified that at this meeting in this law office she brought up the question as to whether or not her husband's job might be in jeopardy (R. 255), saying that it did not seem fair to bring her husband and his job into it; and that Wiechert thereupon said it could be done and had been done (R. 258, 259). And Mrs. Stewart testified that after these conversations in this law office she was "just to where" she did not know what to do, and the more she. studied she thought of those children that would suffer if her son-in-law would lose his job, so she agreed to take the \$5,000.00, though it was not as much as she thought she ought to have (R. 174).

Respondent's counsel thereupon called in one Felsen, an attorney, who was introduced to Mrs. Stewart and her daughter, Mrs. Hamm. A petition had been prepared to be presented to the Probate Court for an order approving the settlement, and Felsen and Mrs. Stewart went to the Probate Court at Belleville where the petition was presented and the order was entered (R. 96, 98). On the same day a draft was issued by respondent for \$5,150.00, payable to Mrs. Stewart, as administratrix, and to said Felsen, attorney, and she executed a release to respondent This draft was deposited in bank and out (R. 83-86). of the proceeds Felsen received \$150.00 for his services (R. 198-200). It was admitted that on December 6, 1937, Mrs. Stewart tendered back to Wiechert, for respondent, said sum of \$5,000.00, with interest thereon, and that the tender was refused (R. 168, 169).

Respondent, by its second amended answer (R. 5-8), set up the release executed by Mrs. Stewart, as administratrix, as barring a right of recovery, and pleaded the order of the Probate Court approving the settlement. By her reply the administratrix alleged that the settlement and her signature to the release had been procured by duress, coercion and oppression on the part of respondent, its agents, servants and employees, pleading the facts in that connection, and prayed that the release and contract of settlement be declared null and void (R. 13-17).

SUMMARY OF ARGUMENT.

I.

Respondent's contentions under points one and two of its brief to the effect that petitioner's petition for the writ rests upon unwarranted assumptions by petitioner, and that under the evidence adduced the ruling below in the last opinion of the Court of Appeals is in accord with applicable rulings of this Court, are without merit. The Court unsoundly ruled that no recovery could be had in the absence of direct proof that Stewart tried to use the pin lifter; and the Court and respondent both disregard the rule that the plaintiff is entitled to the benefit of every inference fairly deducible from the facts in evidence.

II.

This Court, having the entire record before it, has the power not only to review the action of the Court of Appeals, as shown by its last opinion, but the power to review the entire record and make such disposition of the case as the Court of Appeals should have made of it on the appeal to that court. And petitioner requests the Court to exercise such power.

ш.

Respondent's contention that the order of the Probate Court of St. Clair County approving the purported settlement by Mrs. Stewart of her cause of action constituted a judgment that is not subject to collateral attack in the District Court, is without merit. Mrs. Stewart, as administratrix, being authorized by statutory designation to institute and maintain the action, was vested with full power to compromise the claim without any order of the Probate Court or of any other court. Such order gave the administratrix no power that she did not already possess;

and on the other hand, it could give no validity to a purported settlement voidable because of matters in pais.

IV.

The evidence adduced on the issue of duress amply sufficed to make that question one for the jury. As to what will constitute duress, the modern rule is that it matters not what form the coercion may take, provided it is such as to warrant a finding that the victim was deprived of free contractual volition. All of the surrounding facts and circumstances are to be considered and whether, in a given case, the execution of an instrument was procured by duress is usually one of fact for the jury. It is so in this case.

V

The other points relied upon by respondent upon the appeal are likewise lacking in substance. The District Court's charge to the jury fully and fairly covered every issue in the case, from every standpoint, and is not open to any charge of error either by reason of anything included therein or because of anything omitted therefrom. The District Court did not err in instructing the jury that in the absence of any evidence that Stewart did not use the pin lifter the law presumes that he did use the pin lifter before going between the ends of the cars. The ruling of the Court of Appeals as to this instruction in its first opinion (115 Fed. [2] 317, 320, 322, R. 402, 408, 411) is unsound and in conflict with settled principles and with the decisions of this Court. And when the charge as a whole is considered, it is clear that the portion thereof above mentioned could not have misled the jury to the prejudice of respondent.

The judgment of the Court of Appeals of April 14, 1941 (R. 444), should therefore be reversed and the judgment of the District Court affirmed.

ARGUMENT.

I.

Points one and two of respondent's brief are devoted to an attempt to support the ruling of the Court of Appeals in its last opinion herein (119 Fed. [2] 85, R. 436, 444), to the effect that the evidence adduced by petitioner in support of the charge that respondent violated the automatic coupler provision of the Safety Appliance Act and that Stewart's death proximately resulted therefrom was insufficient to take those issues to the jury. The questions arising upon this phase of the case have been considered in petitioner's original brief, in support of his petition for the writ (pp. 22-35). The authorities cited by respondent in said points one and two of its brief do not support its said contentions for the reason that the fact situations involved in those cases differ very materially from those present in the instant case. This Court is thoroughly familiar with those cases, and we think it would serve no good purpose to encumber this brief by a detailed discussion of them.

Petitioner, however, desires to point out the basic error into which respondent has fallen and upon which it proceeds throughout these subdivisions of its brief. Under point one of its brief, beginning on page 18 thereof, respondent contends that petitioner's petition for the writ proceeds upon mere "assumptions," having no basis in the record. In this respondent is mistaken. In its argument respondent utterly fails to reckon with the rule that upon a defendant's demurrer to the evidence or motion for a directed verdict the evidence is to be viewed in the light most favorable to the plaintiff; that the evidence is to be taken most strongly against the defendant; that the plaintiff is entitled to the benefit of every rational infer-

ence that may be fairly deducible from the facts in evidence (Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720); and that if uncertainty as to liability arises, either by reason of a conflict of testimony or because reasonable and fair-minded men may honestly draw different conclusions from the evidence, the issue of liability is not one of law for the Court but one of fact to be settled by the jury. Best v. District of Columbia, 291 U. S. 411, 78 L. Ed. 882.

Respondent says, on page 18 of its brief, that petitioner has "assumed" that the deceased was injured while between two freight cars trying to open the knuckle of the coupler of one of them by hand in order to prepare the coupler for coupling by impact. There is no basis for this assertion by respondent. The evidence shows that at the time of Stewart's injury he was engaged in "coupling up cars." Such is the testimony of respondent's engineer, Martin (R. 44). Martin testified that Stewart would walk down a little way, give a back-up signal and a stop signal; that he coupled on again, walked back and gave a back-up signal, then a stop signal, and went between the cars; and that shortly thereafter Martin heard him "holler" (R. 44, 45). If inferences are to be utilized and indulged at all in a lawsuit, then, certainly, reasonable men may inferfrom this testimony that Stewart, whose object, purpose and duty it was to couple those two cars together, went in between the cars to effect such coupling, in the performance of such duty. And that he was trying to effect such coupling by hand inevitably follows by inference from that testimony and that of the witness Stogner who ran to him and found his forearm, between the wrist and the elbow, caught between the couplers (R. 29). Certainly a finding that Stewart was between those cars for the purpose of effecting a coupling by hand would not rest upon mere assumptions or conjecture.

And respondent in point one of its brief says that peti-

tioner has merely assumed that the Court of Appeals ruled that in order for the plaintiff below to make out a case it was essential to adduce the testimony of an eyewitness to the casualty affirmatively showing that the deceased employee tried to open the knuckle by operating the lever of the pin lifter at the side of the car before going between the cars to open the same by hand. But such is the rationale of the ruling of the Court of Appeals. The Court held that no case was made for the jury for the reason that it was the duty of the deceased to use the pin lifter; that there was no proof that he did so; and that the burden was upon the plaintiff to show that such duty was performed (119 Fed. [2] 85, l. c. 88, R. 441). Stewart being dead, direct proof of the performance of this so-called duty could not possibly have been made except by the testimony of an eyewitness who happened to be so situated as to be able to observe and who did observe just what Stewart did or did not do when he approached the opening between these cars and went between them. The Court of Appeals made the failure to adduce such testimony a vital controlling factor in the case, and refused to reckon at all with the presumption that arose that Stewart performed every duty that rested upon him, that he did not put himself in jeopardy of life and limb without first having ascertained that the coupling could not be effected without going between the cars. This, we submit, was plain error. The matter is more fully discussed under point I (A) of petitioner's original brief (pp. 24-30). What is there said need not be here reiterated.

And this should suffice to dispose of respondent's contention, on page 19 of its brief, that petitioner has merely assumed that the last-mentioned ruling of the Court of Appeals is such as to deny a recovery even though evidence be adduced to support a finding that the pin lifter was not in fact in efficient working order. The Court's

ruling in this portion of its opinion is such as to deny a recovery regardless of the evidence that was adduced as to the inoperative condition of the pin lifter, because the holding of the Court in this connection is to the effect that in the absence of proof that the deceased performed the duty that the Court said rested upon him, then, regardless of everything else, no recovery could be had.

And we may add that respondent's contention in these subdivisions of its brief that there was no evidence to support a finding that the pin lifter was not in efficient, working order, also utterly fails to reckon with the rule that in determining whether a case was made the plaintiff is entitled to the benefit of every fair and legitimate inference reosonably deducible from the evidence. And when this rule is considered. Stogner's testimony, we submit. fully sufficed to show that the pin lifting appliance was inoperative and inefficient. When Stogner went to couple these cars together shortly after the casualty he went between them and made the coupling by hand (R. 34), though he tried to use this pin lifter (R. 36). His statement that he tried to use the pin lifter carries with it the implication that he was unable to get it to function. And he testified that if the pin lifter is working it is not necessary to go between the cars to open the knuckle by hand (R. 34). To say that there is no evidence of an inoperative pin lifter under such circumstances is to say that sensible men upon a jury are not entitled to draw those natural, reasonable inferences that men in every walk of life constantly draw, utilize and act upon.

Nor is there any merit in respondent's contention that these drawbars may have remained jammed together as they were when Stewart's arm was caught between them, and that this may have prevented Stogner from operating the pin lifter. Martin's testimony shows that when it was found that Stewart's arm was caught between the couplers he (Martin) moved the engine westwardly upon signal in order to release Stewart, separating the drawbars (R. 46).

П.

Under points three and four of its brief respondent discusses assignments of error made on the appeal from the District Court, though those matters were not considered by the Court of Appeals in its last opinion herein (119 Fed. [2] 85, R. 436-444); this upon the theory that those matters respectively afford ground for support of the Court of Appeals' judgment of reversal herein. We feel that nothing should deter this Court from reversing the last judgment of the Court of Appeals herein, predicated as it is upon an opinion which in one respect unsoundly decides an important question of federal law that, in its precise aspect, does not appear to have been expressly decided by this Court, as shown by petitioner's original brief (pp. 24-26), and which in other respects runs squarely counter to many prior decisions of this Court, as shown in petitioner's brief (pp. 28-35). However, we shall welcome the Court's consideration of those matters brought forward by respondent in said points three and four of its brief. They are below discussed under subdivisions III and IV of petitioner's argument herein. And petitioner trusts that this Court, having the entire record before it, will not only review the action of the Court of Appeals in its said last opinion and the additional questions thus raised by respondent, but the entire record, and make such disposition of this case as the Court of Appeals should have made upon the appeal to it from the District Court. This Court has, of course, power so to do.

In Story Parchment Company v. Paterson Parchment Paper Co., 282 U. S. 555, l. c. 567, 568, 75 L. Ed. 544, 550, 551, this Court said:

"Other assignments of error made on the appeal from the district court were not considered by the court below. No argument in support of these assignments has been submitted here, and respondents assume that they will be remitted for the consideration of the court below if the judgment of that court be reversed. The entire record, however, is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court. Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 267; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 588. And see Langues v. Green, supra. Accordingly, we have examined these assignments, some eight in number. One or more of them involve questions which have been disposed of by the foregoing opinion. We find nothing in any of the others of sufficient substance or materiality to call for consideration.

"The judgment of the court of appeals is reversed and that of the district court affirmed."

III.

Respondent, under point three of its brief (pp. 29-31), contends that since the purported settlement by Mrs. Stewart of her cause of action was approved by an order of the Probate Court of St. Clair County, such order of approval constituted a judgment which could not be collaterally attacked. But it is plain that this contention is without merit; and the Court of Appeals in its first opinion herein properly so ruled (115 Fed. [2] 317, l. c. 321, R. 409, 410). Such order of the Probate Court is not a judgment that may be pleaded in bar. The real issue in this connection in the District Court was whether the release signed by Mrs. Stewart was voidable upon the grounds alleged. This order of the Probate Court is wholly inconsequential, and immaterial to any real issue

in the case. Mrs. Stewart, as administratrix of her deceased husband's estate, being authorized by statutory designation to institute and maintain the action against respondent under the Employers' Liability Act, was vested with full power to compromise the claim without any order of the Probate Court or of any other court. Treadway v. St. Louis, I. M. & S. Ry. Co., 127 Ark. 211, 190 S. W. 130; McCarron v. New York Central R. Co., 239 Mass. 64, 134 N. E. 478. The Court of Appeals in its first opinion herein, (115 Fed. [2nd] 317, I. c. 321, 322, R. 409, 410) said:

"'Where, as here, the death action is one under the Federal Employers' Liability Act, it is governed exclusively by the federal law. The personal representative does not sue by his inherent right as representative of the estate of the decedent, but by virtue of statutory designation and as trustee for the person or persons on whose behalf the act authorizes recovery. And the recovery is not for the benefit of the estate, is not an asset thereof, but is for the personal benefit of the beneficiary or beneficiaries designated by the statute.'

"Chicago, Burlington & Quincy R. Co. v. Wells-Dickey Trust Co., 275 U. S. 161, l. c. 163; Taylor v. Taylor, 232 U. S. 363; Mann v. Minnesota Electric Light & Power Co., 10 Cir., 43 F. [2d] 36; American Car & Foundry Co. v. Anderson, 8 Cir., 211 F. 301, 308.

"The widow was not compelled by law to apply to the Probate Court for authority respecting the compromise of this case, and we think the action of the trial court in rejecting the evidence of approval by the Probate Court of the compromise settlement was justified."

It is the well-settled rule, supported by the overwhelming weight of authority, that an administrator authorized by statute to sue for damages for the death of another may compromise the claim without applying to the Probate Court or any other court for authority so to do. Mann v. Minnesota Electric L. & P. Co., 43 Fed. (2) 36, l. c. 38; American Car & Foundry Co. v. Anderson, 211 Fed. 301, l. c. 308; Washington v. L. & N. Ry. Co., 136 Ill. 49, 26 N. E. 653.

Nor is the matter in anywise affected by the fact that the action here is in part to recover for conscious pain and suffering of the deceased before his death. Where a verdict is had for conscious pain and suffering of the deceased as well as for pecuniary loss resulting to the designated beneficiary or beneficiaries, the entire recovery is for the personal benefit of such beneficiary or beneficiaries. Chicago, B. & Q. R. Co. v. Wells-Dickey Trust Co., 275 U. S. 161, 163, 72 L. Ed. 216.

This order of the Probate Court was nugatory. It gave the administratrix no power she did not already possess. On the other hand, it could give no validity to a purported settlement that was voidable because of matters in pais. The fact that respondent's East St. Louis counsel had a lawyer, engaged and paid by respondent, go with Mrs. Stewart to the Probate Court, purport to act as her counsel, and go through the formality of obtaining an order approving the purported settlement (R. 1280, 1284). afforded no obstacle to the avoidance of the purported instrument of release. It is a fair inference that this action on the part of respondent's counsel (counsel who do not appear in this court) was originally intended as "window dressing"; something designed to give a semblance of respectability to the purported settlement, the facts surrounding which we shall presently discuss.

IV.

Under point four of respondent's brief (p. 32) it is contended that the judgment of the District Court should

have been reversed upon the ground that the evidence adduced was insufficient to warrant a finding that the purported release was procured by coercion or duress so as to warrant the avoidance thereof in the action in the District Court. Such contention, we submit, is devoid of merit.

While this question was not considered by the Court of Appeals in its last opinion, it was passed upon by that court in its former opinion herein. In holding that the facts and circumstances shown in evidence sufficed to make this issue one for the jury, the Court of Appeals in its first opinion (115 Fed. [2] 317, l. c.) quoted from its opinion in Winget v. Rockwood, 69 Fed. (2) 326, l. c. 330, as follows:

There is no legal standard of resistance with which the victim must comply at the peril of being remediless for a wrong done, and no general rule as to the sufficiency of facts to produce duress. The question in each case is whether the person so acted upon, by threats of the person claiming the benefit of the contract, was bereft of the quality of mind essential to the making of a contract, and whether the contract was thereby obtained. In other words, duress is not to be tested by the character of the threats, but rather by the effect produced thereby on the mind of the victim. The means used, the age, sex, state of health and mental characteristics of the victim are all evidentiary, but the ultimate fact in issue is whether such person was bereft of the free exercise of his will power.

[&]quot;"The trend of modern authority is to the effect that a contract obtained by so oppressing a person by threats as to deprive him of the free exercise of will, may be voided on the ground of duress. What constitutes duress is a matter of law; whether duress exists in a particular transaction is usually a matter of fact."

In no phase of the law, perhaps, have the rules and precepts of the early common law become more altered or relaxed. Under the modern doctrine, now recognized and applied by the courts generally, if not universally, in this country, evidence adduced tending to show that the signature to an instrument was obtained by any form of coercion exerted or caused to be exerted by the other party whereby the signer was deprived of the exercise of that free will and contractual quality of mind essential to the making of a valid contract, suffices to warrant the submission of the issue of duress and to support a finding that such instrument was procured by duress. The settled rule is that the test is not so much the particular means by which the signing of the instrument was procured, as it is the victim's state of mind that was induced by the means employed. The form that the coercion may take is not material, provided it was such as warrants a finding that the victim thereof was deprived of free contractual volition. On such issue all the surrounding facts and circumstances are to be considered. And, as said in the Winget case, supra, the question is usually one of fact for the jury. It is so in this case. Winget v. Rockwood (8 Cir.), 69 Fed. (2d) 326; White v. Scarritt, 341 Mo. 1004, 111 S. W. (2d) 18; Mississippi Valley Trust Co. v. Begley, 298 Mo. 684, 252 S. W. 76, 79; Miss. Valley Trust Co. v. Begley, 310 Mo. 287, 275 S. W. 540; Lipman-Wolfe & Co. v. Phoenix Assurance Co., 258 F. 544; Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, 167 N. E. 69; Harris v. Flack, 289 Ill. 222, 124 N. E. 377; Farmers State Bank v. Dowler, 112 Nebr. 271, 199 N. W. 528; Guttenfelder v. Iebsen, 222 Ia. 1116, 270 N. W. 900; 17 Corpus Juris Secundum, Contracts, Sec. 175, pp. 533-535.

The modern rule is succinctly stated in 17 Corpus Juris Secundum, pp. 533, 534, 535, Sec. 175, as follows:

"The rule as it now exists is that the question of

duress is one of fact in the particular case, to be determined on consideration of the surrounding circumstances, such as age, sex, capacity, situation, and relation of the parties * *. The test is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed."

In the instant case the instrument sought to be avoided is one purporting to release a widow's perfectly good and valid cause of action for the death of her husband, for a grossly inadequate consideration. After her husband's death Mrs. Stewart was appointed administratrix and obtained counsel who instituted in her behalf this suit in the District Court. Respondent's claim agent sought by every means within his power to bring about a settlement and release of the cause of action. He pursued Mrs. Stewart from place to place, and from state to state, telling her, in substance, that she had no cause of action and would get nothing unless she took what was offered her; though it appeared at the trial below that respondent had not a vestige of defense to the claim; no evidence to offer on the issue as to the alleged violation of the Safety Appliance Act. These efforts of Hahn to effect a settlement were made not only before the suit was filed but after Mrs. Stewart had obtained counsel and while her suit was pending, through attempted negotiations behind her counsel's back.

Respondent is one of sixteen proprietary lines owning the Terminal Railroad Association of St. Louis (R. 148). Hahn's prior efforts having failed to bring about a settlement, he learned that Mrs. Stewart's son-in-law, one Hamm, was employed by the Terminal as a brakeman in its yards in East St. Louis, Illinois, or vicinity. He thereupon set on foot a cunningly devised scheme for overcoming Mrs. Stewart's will power and coercing her into

making a settlement of her cause of action upon respondent's terms. He got in touch with Mr. Howell, the head of the legal department of the Terminal, and requested him to take a hand in the matter. He had Howell arrange to have Hamm called to the Terminal's legal department in the City of St. Louis to discuss the settlement of Mrs. Stewart's case. Howell did discuss the matter with Hamm, and this conference ended by Howell sending Hamm to see Mr. Campbell of the law firm of Kramer, Campbell, Costello & Wiechert of East St. Louis, Illinois, respondent's attorneys (R. 145-151, 304). Shortly thereafter Hamm received a telegram from Hahn, the claim agent, telling him that Campbell suggested a meeting at his office (R. 125, 179). This meeting was held on November 30, 1937; but in the meantime this telegram had been forwarded to Mrs. Stewart, who was at Castleton, Illinois (R. 249), and Mrs. Stewart hurried to East St. Louis and to the Hamm home where she; Hamm and Mrs. Hamm discussed the matter at length. The facts set out in our statement, supra, show that, because of what had occurred, Hamm had become thoroughly imbued with the fear that his employment with the Terminal, his job, was in jeopardy, and consequently urged Mrs. Stewart to settle the case; and that both Mrs. Stewart and Mrs. Hamm likewise became imbued with the fear of the loss by Hamm of his job if a settlement were not made on respondent's terms. The record is replete with evidence showing that the subject was discussed over and over again before the meeting in the office of respondent's East St. Louis attorneys; and that Mrs. Stewart, Hamm and Mrs. Hamm as well, were greatly worried over the matter (R. 172-182, 249, 253).

And at the meeting in this law office on November 30, 1937, at which Mrs. Stewart, Mr. and Mrs. Hamm and Wiechert, the attorney, were present—Hahn being there a

part of the time—the whole situation was discussed at length. Wiechert was handling the matter for respondent. The papers had all been prepared for a settlement on the basis of \$5,000.00; though Mrs. Stewart had never agreed to accept any such sum or indicated that she would settle for that figure (R. 174). Wiechert admitted that he knew, not only that he was dealing with this widow in the absence of her attorney, but that her son-in-law, Hamm, had been called into the office of the general attorney for the Terminal in regard to bringing about of the settlement (R. 274, 275). And he also knew that by reason of what had been done, Mrs. Stewart, Hamm and Mrs. Hamm had become thoroughly imbued with the fear of Hamm's loss of employment if Mrs. Stewart did not accede to respondent's demand for a settlement on its terms; for the matter of Hamm's job being in jeopardy was brought up in this conference by Mrs. Hamm (R. 189, 254). She protested that it wasn't fair to bring her husband and his job into it, and discussed the matter in that vein at some length (R. 254). And at that juncture, according to the testimony of both Mrs. Stewart and Mrs. Hamm, Wiechert spoke up and said that Hamm could lose his job, that it had been done (R. 185-187); that it could be done and it had been done (R. 255). And the evidence shows that this had such an effect upon Mrs. Stewart that she capitulated, though she was dissatisfied with the amount offered (R. 174, 185). She said she made up her mind to accept the settlement when she was told that Hamm could lose his job (R. 185).

We submit that the evidence in this record pertinent to this phase of the case amply warranted the jury in finding, as the jury did, that this purported settlement and Mrs. Stewart's signature to the purported release were obtained by coercion and duress. A jury could well find that this scheme, set on foot by the claim agent, Hahn, fostered and

aided by Howell, the Terminal's general attorney, and ultimately consummated by Wiechert in the law offices of respondent's East St. Louis counsel, was designed from the outset to deprive Mrs. Stewart of free contractual volition in the matter by means of the fear that would naturally be aroused as to what might happen to her sonin-law's job if respondent's wishes and those of the Terminal were not carried out; a fear that would naturally be aroused in Hamm and be communicated to Mrs. Stewart, as the actors in this conspiracy well knew, and which might well be expected to have the very effect upon the victim that it evidently did have. It was not necessary that any express or overt threat be made by Howell as to loss of employment by Hamm. A request by Howell upon Hamm to take a hand in bringing about a settlement was tantamount to a command. Naturally the matter would not be so crudely handled by the head of the Terminal's legal department, in discussing the matter with Hamm, as to then and there, forthrightly and openly, threaten Hamm with the loss of his job. But that these conspirators intended to have Hamm understand and believe that he was threatened with the loss of employment, and to have this communicated by him to his mother-in-law, whereby to produce in her a state of mind that would make her subservient to the will of respondent's agents and attorneys, is a natural and logical conclusion from the facts of this record.

On the issue of duress threats may be implied from what is said and done. Mississippi Valley Trust Co. v. Begley, 310 Mo. 287, 275 S. W. 540; Benedict v. Roome, 106 Mich. 378, 64 N. W. 193. If those engaged in this unsavory affair in behalf of respondent intended that the course pursued by them operate as an implied threat as to the security of Hamm's employment, with the design of using that as a weapon whereby to make Mrs. Stewart

subservient to their will, and if Mrs. Stewart so understood it and was thereby so influenced as to be deprived of free contractual volition, as the evidence overwhelmingly showed, then this release was obtained by coercion and duress just as certainly as though obtained by the most direct and express threats. Benedict v. Roome, supra, 106 Mich. 378, 64 N. W. 193. There can be no doubt as to what were the intention and design of Hahn, the claim agent, in the matter. He was asked why he did not go to Hamm instead of asking Howell to have Hamm brought in, and his answer was that he thought the latter was the best way to handle it (R. 303). And he brazenly said, "It worked, it worked all right" (R. 304). And the evidence pointedly goes to show that when the matter was consummated in this law office, respondent's attorney Wiechert knew full well the state of mind that had been produced in the victim, Mrs. Stewart, and wrongfully took advantage thereof. He did not allay the fear that had been implanted in her mind regarding her son-in-law and his job. On the contrary, according to the testimony of both Mrs. Stewart and Mrs. Hamm, he took pains to let them know that their fears were not groundless; that Hamm could lose his job (R. 185, 258, 259). And Mrs. Stewart's testimony very pointedly shows that this operated to overcome her will; to bring about in her a state of mind whereby she was deprived of free contractual volition and rendered a victim of coercion and duress (R. 174, 189).

Obviously, we submit, the District Court was fully warranted in submitting this question to the jury, as it did by appropriate instructions; and the jury's verdict concludes the matter.

V

Petitioner respectfully submits that upon this record the last judgment of the Court of Appeals herein should

he reversed and that of the District Court affirmed. Respondent's "Statement of Points Relied Upon on Appeal" (R. 349, 393) are formidable in number and extent of space covered, but lacking in substance. Those relating to the refusal of the District Court to direct a verdict for respondent (Points I and II, R. 349-356), to the refusal of respondent's motion for judgment non obstante veredicto (Point numbered XVIII, R. 393), and to the District Court's refusal to admit in evidence respondent's various exhibits relating to the proceedings in the Probate Court (Point XII, R. 368-377) have been covered by what is said in petitioner's original brief and hereinabove in this brief. Those relating to the admission and exclusion of testimony (Points XXIII, XXIV and XXVI, R. 378, 392), and to the refusal of the District Court to declare a mistrial (Point XXVII, R. 392, 393), obviously contain nothing of sufficient substance to warrant consideration. The remaining points (III to XXI, inclusive, R. 356-368) relate to alleged errors of the District Court in charging the jury (Points III and IV, R. 356-358), and in refusing respondent's requests to charge (Points V-XXI, R. 358-368). A reading of the Court's charge, to which we invite this Court's attention (R. 333-340), will, we think, suffice to refute every claim of error relating to the matter of charging or refusing to charge the jury. This charge, petitioner submits, fully and fairly covers the issues in this case, from every standpoint, and is not open to any charge of error either by reason of anything included therein or because of anything omitted therefrom.

In the first opinion of the Court of Appeals in this case (115 Fed. [2] 317, l. c. 320, 322, R. 402, 408, 411), the Court considered one isolated sentence of this charge and held—erroneously, petitioner submits—that it was error to include that sentence in the charge. This was the sole ground upon which the Court of Appeals in that opinion

based its order reversing the judgment and remanding the cause. However, the Court sustained petitioner's motion for a rehearing, as well as that of respondent (R. 435). The sentence of the charge referred to (which was the basis of respondent's Point III, R. 356, 357) is as follows:

"You are instructed that it was the duty of the deceased in the performance of his work, before going between the cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, extending on the outside of the car, and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars, if you find he did go between the ends of the cars."

The Court of Appeals, in its first opinion herein, criticized this part of the charge because of the inclusion therein of the words "and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars," saying that this language "is inconsistent with the burden of proof imposed by law upon a plaintiff" (115 Fed. [2], l. c. 322). But we respectfully submit that in so ruling the Court of Appeals inadvertently fell into error; an error that the Court perhaps subsequently perceived.

The presumption alluded to by the District Court in this part of the charge is one fully recognized by the law, and, under the circumstances of this case, no error was committed in informing the jury thereof. Since Stewart's lips are closed in death, if there is no evidence that he did not undertake to open the knuckle of the east car by using the pin lifter on that car, in order to avoid placing himself in peril of life and limb by going between the cars to open the knuckle by hand, the presumption prevails that he did undertake to use the pin lifter before going

between the cars; that he performed whatever duty may be said to have rested upon him in that connection; that he would not risk his life by voluntarily going between the cars and placing a portion of his body between the couplers without having ascertained, by attempting to use the pin lifter, that a coupling could not otherwise be effected. That such presumption prima facie arises; and that, if there is no evidence tending to repel it or put it to flight, it remains in the case as a factor to be reckoned with, is, we submit, incontrovertible.

Because of the love of life and the human instinct to avoid danger, the presumption always prevails, in the absence of evidence to the contrary, that a deceased exercised due care for his own safety. Miller v. Union Pacific R. Co., 290 U. S. 227, l. c. 233, 78 L. Ed. 285, l. c. 289; Baltimore & Potomac R. R. Co. v. Landrigan, 191 J. S. 461, l. c. 474, 48 L. Ed. 262, l. c. 267; that a deceased did not commit suicide (Travelers Ins. Co. v. McConkey, 127 U. S. 661, l. c. 667, 33 L. Ed. 308, l. c. 311; New York Life Ins. Co. v. Brown [5th Cir.], 39 F. [2d] 376); that a deceased performed whatever duty rested upon him in the premises (Worthington v. Elmer, 207 F. 306, 309; New Aetna Portland Cement Co. v. Hatt, 231 F. 611, 617).

In its brief in this court respondent reiterates its contention that there is positive testimony that Stewart did not try to use the pin lifter before going between the cars to effect the coupling by hand. There is no such evidence. As pointed out in our original brief, the testimony of Martin, the engineer, in this connection (R. 46) is nothing more or less than that he did not notice or pay attention to what Stewart did in that regard. Under the circumstances, Martin doubtless could not have observed whether Stewart did or did not use the pin lifter; but we have his word for it that he paid no attention to what Stewart did

in that connection. Where there is evidence tending to repel or overthrow such a presumption, concededly the presumption takes flight and the jury cannot then be rightfully authorized to consider it as though it were evidence in the case to be weighed against that evidence which in fact puts the presumption out of the case. But where, as here, there is no evidence one way or the other touching the matter, the presumption that the law raises remains in the case and it is not error to so inform the jury.

In Baltimore & Potomac R. R. Co. v. Landrigan, supra, 191 U. S. 461, the action was one for wrongful death. The deceased was employed as a machinist in the defendant's roundhouse, but was run over and killed at night, after his working hours, by a car or train of the defendant while attempting to cross the defendant's tracks on his way home. There was no eyewitness to the casualty, but this Court held that the evidence sufficed to warrant the inference that the deceased was run over by a car that had been allowed to break away from other cars through the defendant's negligence. In the course of the opinion the Court (l. c. 473, 474) said:

"(1) There was no error in instructing the jury that in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened. The law was so declared in Texas & Pacific Railway Co. v. Gentry, 163 U. S. 353, 366. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maining and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to.

"The court did not tell the jury that all those who cross railroad tracks, stop, look and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence."

In the instant case the District Court did not tell the jury that Stewart used the pin lifter, but that in the absence of evidence to the contrary he was presumed to have done so; and it was left to the jury to say if there was such evidence. We respectfully say that as a matter of law there was no such evidence. But surely it cannot be doubted that the jurors, being the judges of the weight to be given to the testimony of any witness, were at liberty to find that when Martin said he did not notice Stewart he meant just what the words naturally imply, namely, that he did not pay attention to whether Stewart did or did not use the pin lifter.

And we further respectfully submit that the giving of this instruction was not at all inconsistent with the burden of proof imposed by law upon a plaintiff, as the Circuit Court of Appeals in its first opinion appeared to think. In this case the plaintiff below carried the burden resting upon her to show a defective appliance when she showed by the testimony of the witness Stogner (R. 26-40) that respondent did not have its car equipped with a pin lifter such as the law requires, one that could be operated without the necessity of going between the cars; that Stewart was sent to encounter a defective and inoperative coupling device because of respondent's failure to comply with the law. It was not sought by this instruction to permit the jury first to utilize the presumption (in the absence of evidence to the contrary) that Stewart tried to use the pin lifter before going between the cars and then from this to presume or infer that the pin lifter was in fact

inoperative; nor, in view of other portions of the charge, to which we shall presently refer, could the instruction have been misleading in this regard.

The Court of Appeals in its first opinion referred, in this connection, to Looney v. Metropolitan Railroad Co., 200 U. S. 480, 487, 488. But the Looney case is, we submit, wholly without application. The action was there one for death, but the case did not involve the propriety of giving such an instruction as this, or any other instruction. This Court simply held that the plaintiff's evidence failed to show any actionable negligence on the part of defendant. The Court expressly recognized that there was a presumption of care on the part of the person killed; that a presumption of the performance of duty attended the deceased; but said that a like presumption attended the defendant, and that the negligence of a defendant may not be inferred merely from a presumption of care on the part of the person killed. That ruling is here far afield.

And this isolated portion of the charge is not to be considered alone. The rule is that in determining whether error inheres in the charge, the charge as a whole must be considered and not some isolated portion of it. And in the instant case, when the charge as a whole is considered, it is, we submit, altogether clear that that portion thereof referring to the presumption aforesaid could not conceivably, have had the effect of causing the jurors to believe that because of said presumption as to the conduct of the deceased they were authorized to infer that the coupling device was defective, or that such presumption could have the effect of relieving the plaintiff of the burden of proving by the preponderance or greater weight of the evidence that the defendant did not have its car equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars and that Stewart's death proximately resulted

therefrom. The Court fully, correctly and repeatedly instructed the jury as to the burden resting upon the plaintiff, and repeatedly told the jury that there was no presumption that the couplers would not couple automatically by impact. We set out below those portions of the charge relating to these matters as follows:

"The Court charges the jury that before plaintiff may recover in this case, she must prove by the preponderance or the greater weight of the evidence that the injury to and death of plaintiff's decedent were caused by the cars in question not being equipped with couplers coupling automatically by impact.

"You cannot presume that the couplers would not couple by impact, but on the contrary the law places on plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the credible evidence.

"This burden abides with plaintiff throughout the case, and if you find that plaintiff has not proved the above facts to your reasonable satisfaction by the preponderance or greater weight of the evidence, or if you find the evidence on the subject to be evenly balanced, then in either state of events, plaintiff is not entitled to recover against defendant, and your verdict must be for the defendant (R, 337).

"The Court charges the jury that you cannot presume that the couplers on the cars in question would not couple automatically by impact, but on the contrary the law places upon the plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the evidence.

"Unless plaintiff has proven such facts to your reasonable satisfaction as above stated, then plaintiff is not entitled to recover in this case, and your verdict must be for the defendant.

"The Court charges the jury in this case that the burden of proof rests upon the plaintiff to prove by the preponderance, that is, the greater weight of the credible evidence, the facts necessary to entitle her to recover, and the burden of proof does not shift from side to side, but constantly remains with the plaintiff; therefore, if you find the evidence to be evenly balanced in this case, or if you find plaintiff has not proved by the preponderance, that is, the greater weight of the evidence, facts necessary to entitle her to recover, then your verdict must be for the defendant.

"The Court charges the jury, unless you find from the preponderance or greater weight of the evidence in this case, that the proximate cause of injury and death of decedent was caused by a coupler or couplers that would not couple automatically by impact, then your verdict must be for the defendant.

Court charges the jury that no liability on the part of the defendant arises from the mere happening of an accident. The mere fact that an accident happened is not proof that the coupler would not couple automatically by impact.

"There is no presumption in this case that the coupler would not couple automatically by impact.

"The burden of proof predominates upon plaintiff, from the beginning to the end, to prove by the preponderance of the evidence the couplers would not couple automatically by impact, and, as a proximate result thereof, plaintiff's decedent was injured and died" (R. 338, 339).

For the reasons stated above, petitioner respectfully submits that it was not even technical error to charge the jury that, in the absence of evidence to the contrary, the law presumes that Stewart, whose lips are closed in death, tried to use the pin lifter before risking life and limb by going between the cars to effect the coupling by hand; and that, certainly, when the charge as a whole is con-

sidered, there can be no ground to contend that respondent was deprived of any substantial right by reason of anything contained therein or anything omitted therefrom. It would, indeed, be difficult to find a charge in a case of this character more complete, comprehensive or fairer to the parties litigant.

Petitioner therefore prays that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit of date April 14, 1941 (B. 444), be reversed and that the judgment of the District Court be affirmed.

Respectfully submitted,

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CHARLES P. NOELL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 161.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased, Petitioner,

V

Southern Railway Company, a Corporation, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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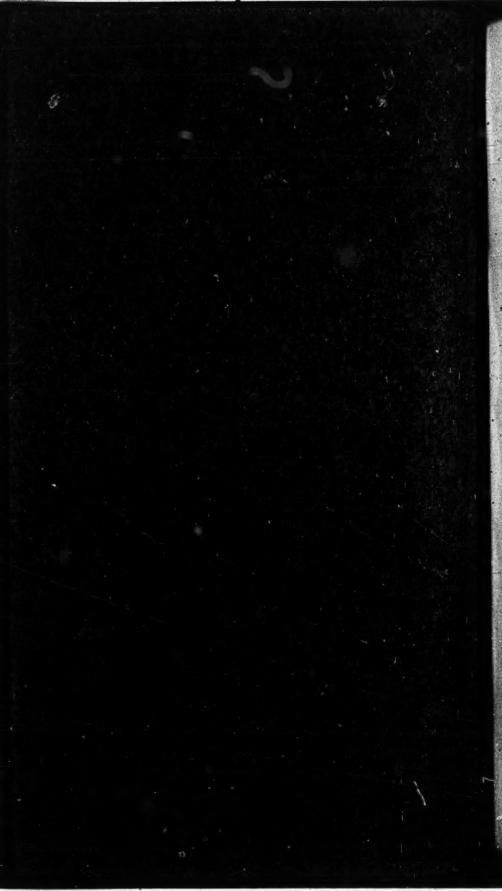


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 161.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased, Petitioner,

Southern Railway Company a Corporation, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

The last opinion below, of the United States Circuit Court of Appeals for the Eighth Circuit, is reported in 119 F. (2d) 85 and will be found in the record beginning at page 436.

A previous opinion of the same court, rendered on November 1, 1940, is reported in 115 F. (2d) 317 and will be found in the record beginning at page 402.

STATEMENT.

Petitioner's intestate, John R. Stewart, while employed by respondent as a brakeman in interstate commerce, and at a time when respondent was engaged in interstate commerce, was injured by reason of his right arm being caught and mashed between the draw bars (i. e., between the closed couplers at the ends of the draw bars) as he was between cars of a cut in a switching yard in East St. Louis, Illinois. (R. 26, 29.) Stewart was an experienced brakeman, sixty years of age at the time of his injury. (R. 54.) The accident occurred on February 12, 1937, at 5:40 P. M. on a dry day. (R. 26-27.)

He sustained a crushing injury to his right forearm, crushed from the elbow to the wrist. (R. 131.) His arm was traumatically amputated, except for two tendons holding it to the elbow. (R. 131.) It was surgically removed the afternoon of the next day. (R. 131.) He died at 8:20 P. M. on the second day, February 14, 1937. (R. 133.) His widow, petitioner's predecessor administratrix, testified that he was a moderate drinker. (R. 57.) His attending physician testified that he developed delirium tremens (R. 132) and that the direct cause of his death was the delirium tremens. with a cardiac dilatation and a certain amount of shock. but that delirium tremens was the principal cause: that Stewart's wife gave the physician a history of Stewart's laying off work and drinking and told him that Stewart had laid off and been on a drunk just prior to the day of his injury. (R. 133.) Mrs. Stewart denied that she had given the physician this history, though she again testified that her husband drank liquor "about like ordinarily a man would drink." (R. 175.)

A doctor of the allopathic school of medicine, witness for plaintiff, (R. 232), who did not see (R. 237) nor treat Stewart (R. 239) and who knew nothing about the case except what he learned from examining the hospital records of the case (R. 202), expressed the opinion that delirium tremens was not a cause of the death (R. 238), although he testified that men do die of delirium tremens where they have been alcoholics and have received an injury. (R. 238.)

Stewart was survived by his dependent widow, Mary Stewart, and by no other dependents or minor children. (R. 3.) The widow was appointed administratrix of his estate by the Probate Court of St. Clair County, Illinois, by letters issued April 16, 1937. (R. 8.)

On April 30, 1937, she filed suit as administratrix against respondent, in the District Court of the United States for the Eastern District of Missouri, under the Federal Employers' Liability Act, seeking recovery for conscious pain and suffering and for the death of her decedent, in the sum of \$65,000. (R. 2-4.) The sole charge of negligence was that the couplers between which the deceased was injured were defective, within the meaning of the requirement of the Safety Appliance Act of March 2, 1893, 37 Stat. 531, ch. 196, as amended by the Act of March 2, 1903, 32 Stat. 943, ch. 976. (R. 3.)

Her petition in the cause was signed as attorney by Charles P. Noell, a resident of Missouri, who had been suspended from practice in the courts of Missouri and who was not admitted to practice in the courts of Illinois. Respondent's Illinois lawyers refused to deal with the said Noell regarding settlement of the case because of these facts and because of previous experience they had had with him chasing cases. (R. 273.) It further appears that the said Noell had also been suspended from practice in the federal courts but that the suspension was set aside on appeal. (R. 277.) (See In re Noell, 93 F. 2d 5.)

On November 30, 1937, the plaintiff administratrix filed with the Probate Court of St. Clair County, Illinois, a sworn petition representing that respondent, Southern Railway Company, had offered to settle her claim against it for \$5,000, provided a full release be given, that it was for the best interests of the estate and all persons interested that such settlement be made, but that one Charles P. Noell, of St. Louis, Missouri, claimed a lien for attorney fees out of any amount she should receive in settlement. She alleged that the claimed lien was null and void and that said Charles P. Noell was not entitled to attorney fees or to any lien therefor on said settlement. Her petition prayed an order authorizing her to make the settlement offered by respondent and giving Charles P. Noell notice to appear and present his claim, if any, for attorney fees or lien. (R. 81-83.)

On the same day, the Probate Court entered an order making findings in accordance with the allegations of the sworn petition of the administratrix, holding that it had jurisdiction of the subject matter and of the parties, and approving the proposed settlement and authorizing the administratrix to make it and to give a full and complete release to respondent. It further ordered that Charles P. Noell be given notice of a hearing on December 10, 1937, on his claim for attorney fees and lien on the \$5,000 settlement and ordered the administratrix to make no distribution of the said amount until further order of the court. (R. 96-98.)

The notice was mailed to Charles P. Noell by the Clerk of the Probate Court, in accordance with the order, on the

same day, November 30, 1937. (R. 107-108.)

On the same day, under the authorization and approval of the court order, respondent paid the administratrix \$5,000, plus \$150 to cover the fees of an Illinois attorney who represented her in the Probate Court proceedings, and she executed a full release to respondent. (R. 83-85.)

The record does not tell us what occurred between the administratrix and Charles P. Noell after the latter received the Probate Court's notice of the hearing on his claim against the administratrix, set for December 10, 1937, but the next occurrence is that on December 6th the administratrix went to the offices of respondent's Illinois counsel and tendered back the \$5,000 with interest and the tender was

rejected. (R. 168-169.)

Then, on December 9th, the day before the hearing set on attorney Noell's claim, the administratrix filed in the said Probate Court a second sworn petition, signed only by her and not by counsel, wholly at variance with her previous sworn petition. In it she alleged that the papers signed by her praying for authority to settle her claim were signed as the result of fraud and duress on the part of respondent and its agents and attorneys; that she had subsequently tendered back the money paid her; that she had pending in the Federal Court in St. Louis, Missouri, a motion to set aside the dismissal of her case and to reinstate it on its

docket. The petition prayed an order setting aside the court's prior order authorizing the settlement. (R. 99.) This petition was sworn to before a Notary Public in Missouri.

This was a direct attack upon the Illinois Probate Court's

former order authorizing the settlement.

The Probate Court set the second petition down for hearing. Respondent applied for permission to intervene in support of the order authorizing the settlement and in opposition to the petition to set the same aside. Its motion was granted. After hearing, the Probate Court denied the motion of the administratrix to set aside the order approving and authorizing the settlement. (R. 103.) The administratrix did not appeal from or seek a direct review of this holding of the Probate Court. Instead, she proceeded with her civil action in the Federal District Court in Missouri.

Respondent filed an amended answer in the Federal Court suit, denying the allegations of negligence and for further defense setting up the proceedings in the Probate Court of St. Clair County, Illinois, the settlement and the release in bar. (R. 5-12.)

The administratrix then filed a reply in which she undertook to make a collateral attack on the judgment of the said Probate Court. She alleged that the settlement documents were obtained by respondent by fraud and duress, in the absence of her counsel, repeated her prayer for recovery of money damages and in express terms prayed the Federal District Court in Missouri to hold the judgment of the Probate Court in Illinois null and void and to hold the release given pursuant thereto null and void. (R. 13-17.)

The liability action was tried to judge and jury in the District Court in June, 1939. At the close of the entire evidence respondent moved for a directed verdict on the grounds:

^{1.} That there was no substantial evidence of actionable negligence.

- 2. That there was no substantial evidence that actionable negligence was the proximate cause of the injuries and death.
- 3. That there was no substantial evidence of any breach of duty by respondent.
- 4. That the proceedings in and judgment of the Probate Court in Illinois were binding on plaintiff and could not be collaterally attacked by her in the suit.
- 5. That there was no substantial evidence of actionable fraud or duress or tending to impeach the validity of the release. (R. 319-321.)

The motion was refused. (R. 321.)

In charging the jury on the issue of damages, the court gave the following ambiguous instruction:

"You are further instructed that your award to plaintiff, if any, may not exceed the sum of \$65,000, the amount claimed by plaintiff, less the sum of \$5,000, the amount heretofore received by her." (R. 340.)

The court did not instruct the jury that, if they found a lesser than the maximum amount prayed as the damages to which plaintiff was entitled, they should also return verdict for such amount less the \$5,000 plaintiff had already received. The jury returned a general verdict, finding for plaintiff in the amount of \$17,500. (R. 20.) No one could tell from the verdict whether the jury intended that plaintiff should recover \$17,500 in addition to the \$5,000 she had already received, i. e., an unnamed total of \$22,500, or whether it intended that the \$5,000 be deducted from the amount of \$17,500 named in the verdict, that is judgment for \$12,500 more than she had already received.

The court put upon the verdict the construction most favorable to plaintiff and entered judgment for recovery of \$17,500 in addition to the \$5,000 plaintiff had already received, which meant total recovery of \$22,500 instead of \$17,500. (R. 20-21.) It, however, stayed execution pend-

ing ruling on respondent's motion for judgment non obstante veredicto or, in the alternative, for new trial. (R. 21-22.)

Respondent moved for judgment non obstante veredicto, and in the alternative for new trial, on the following grounds (in addition to errors assigned to rulings on evidence and to instructions given or refused):

- 1. That the verdict was not supported by any competent on legal evidence.
- 2. That the release was binding on plaintiff and there was no evidence showing any fraud or duress.
- 3. That the judgments of the Probate Court of Illinois were res judicata and could not be collaterally attacked in the cause.
- 7. That the verdict was so indefinite as to be a nullity (by reason of the ambiguity above pointed out).
- 10. That the court erred in overruling and denying defendant's motion for directed verdict.
- or tending to prove a violation by defendant of the Safety Appliance Act. (R. 22-24.)

The District Court overruled this motion (R. 24) and respondent appealed to the Circuit Court of Appeals assigning as error all the points made grounds of the above motion. (R. 349-396.)

Pending the appeal, the widow-administratrix died and, upon suggestion of her death, the Court of Appeals, on stipulation of counsel, made an order substituting the present petitioner, Clarence A. Stewart, Administrator, as appellee. (R. 401-402.)

Holdings by the Court of Appeals Below.

In its first opinion, in 115 F. (2d) 317 (R. 402-411), the Court of Appeals held, on the liability issue, with practically no discussion, that the Safety Appliance Act must be liberally construed and that the (undiscussed) evidence

of record was sufficient to warrant the jury in drawing the inference "that there was probable cause to believe that the injury suffered was caused by the breach of duty charged." (R. 409.)

On the issue as to res judicata and collateral attack, it held that the widow-administratrix "was not compelled by law to apply to the Probate Court for authority respecting the compromise of this case, and we think the action of the trial court in rejecting the evidence of approval by the Probate Court of the compromise settlement was justified." (R. 410.)

On the issue of fraud and duress in securing the settlement and release, the court below held that the evidence relied on "was not strongly in support of the charge of fraud and duress" but that it was sufficient to go to the jury. (R. 410-411.)

The Court, however, held that an instruction by the trial court was erroneous, as inconsistent with the burden of proof on plaintiff, which authorized the jury to draw an inference of respondent's negligence as to the alleged safety appliance defect from the presumption of due care on the part of the plaintiff's decedent. This was, we think, entirely correctly held on authority of Looney v. Metropolitan Railroad Co., 200 U.S. 480, 487, 488, where this Court held that the burden is on the plaintiff to show that appliances are defective; that negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff: that there is an equal presumption that defendant performed its duty, which must be overcome by direct evidence; and that one presumption cannot be built upon another. Accordingly, the Court reversed and remanded for a new trial. (R. 411, 412.)

Both parties petitioned the Court below for rehearing, respondent reasserting on all the same grounds that judgment non obstante veredicto should have been entered by the trial court and that the Court of Appeals should have reversed on this ground rather than remanding for new

trial (R. 413-422), while petitioner charged error in holding the instruction erroneous and in remanding for new trial rather than affirming. (R. 423-434.)

The Court below granted both petitions for rehearing and vacated its prior judgment. (R. 435.) In its second opinion, on rehearing, 119 F. (2d) 85 (R. 437, 439), it said:

"On this reargument the question of the insufficiency of the evidence" is brought sharply to our attention, and in our view of the record, it will only be necessary to consider that question."

Whereas in its previous opinion the Court had only reviewed the evidence bearing on the issue of fraud and duress in the settlement and release, in its last opinion it fully and carefully reviewed and analyzed the evidence bearing on the negligence issue. It completely demonstrated and held that there was no substantial evidence to sustain a finding that the safety appliance was defective and that the verdict, as to the sole charge of negligence, rested wholly upon conjecture and surmise. (R: 439-444.) Accordingly, it reversed the judgment of the trial court and remanded with directions to grant respondent's motion for judgment in its favor notwithstanding the verdict (R. 444) without dealing with the other defenses pressed by respondent: settlement and release; res judicata and collateral attack; insufficiency of evidence as to fraud and duress. The sustaining of either of these other defenses would have resulted in the same judgment of reversal and judgment non obstante veredicto for respondent. Hence it is open to respondent here to rely on these other defenses, as well as upon the ground upon which the Court below based its judgment, either in opposition to certiorari or on the merits in support of the judgment sought to be reviewed, if the writ should be granted. United States v. American Ry. Ex. Co., 265 U.S. 425, 435; Story Parchment Paper Co. v. Paterson, 282 U. S. 555, 560; Langues v. Green, 282 U. S. 531, 535; Helvering v. Gowran, 302 U. S. 238, 245;

CA.

^{*}As to the allegation of negligence in defective coupler.

Ticonic Nat'l Bank v. Sprague, 303 U. S. 406, 410, Note 3; LeTulle v. Scofield, 308 U. S. 415, 421; McGoldrick v. Compagnie Gen. Transatlantique, 309 H. S. 430, 434.

The Evidence Bearing on the Negligence Issue.

There was no direct evidence in the record of any safety appliance defect. Plaintiff below sought a finding that the automatic coupler was defective, in violation of the Safety Appliance Act, upon a chain of reasoning from circumstantial evidence, indispensable links in which chain were constructed by basing an inference upon a presumption and by not only thus piling inference on presumption but even doing it in the teeth of positive, undisputed evidence negativing the pyramided inference. Petitioner here seeks certiorari, and bases its charge of error in the judgment below, of conflict with other Circuits and of conflict with this Court's decisions, on the same fallacious chain of reasoning.

That chain of reasoning runs thus: the statute requires couplers coupling automatically, without the necessity of men going between cars; if the pinlifter lever on the side of the car and the mechanism connecting it with the coupler knuckle is in proper working condition so as to open the coupler knuckle on a fair trial, then it is not necessary for the man to go between cars to open a knuckle by hand; Stewart went between cars it must be presumed that he would not negligently go between cars to open a knuckle by hand. If the pin lifter mechanism upon fair trial would open the knuckle; ergo it must be inferred from the preceding presumption, and without any evidence of the fact. that Stewart did give the pinlifter mechanism a fair trial, that it would not efficiently operate to open the coupler knuckle, that therefore the coupler mechanism was

There is no evidence as to why he did so.

^{**}The assertion that he went in for that purpose is based on pure surmise.

^{••••}Indeed, as pointed out by the court below, there was positive evidence to the contrary.

defective within the meaning of the statute; and that ergo it was a defective mechanism which made it necessary for Stewart to go between cars for the (wholly assumed) purpose of opening the knuckle by hand; hence a safety appliance defect was the proximate cause of his injury and of his death.

One vice in this chain of reasoning is the very vice which the Court below in its first opinion found in the charge of the trial court, that it bases an inference that the mechanism was defective wholly upon a presumption that the deceased would not do a negligent thing, overlooking the equal presumption that respondent would not negligently have a defective mechanism, and utterly overlooking the burden of proof which rested on the plaintiff.

Another equal vice in the reasoning is that it not only bases the inference, that Stewart made a fair effort to open the knuckle by lifting the pinlifter and that it would not work, solely on the presumption of Stewart's non-negligence, but that it indulges that inference in the teeth of the evidence of the engineer, that he was watching Stewart all the time for signals and that he did not see him try to lift the pinlifter, although the visibility between them was clear. (R. 46, 47.)

Plaintiff below sought, and petitioner here seeks, to bolster the foregoing fallacious chain of reasoning by another equally fallacious chain. The second chain runs thus: the foreman, Stogner, who was about 90 feet away from Stewart and was not watching him and did not observe whether he tried to use the pinlifter (R. 43), heard Stewart "holler" and went and found him with his arm caught between two closed couplers (R. 29); Stogner didn't know of any other duty that Stewart had at the time except to couple the two cars between which he was caught (R. 34-35); after the accident and after the injured Stewart had been released, Stogner coupled the two couplers between which Stewart had previously been caught, opening one coupler knuckle by hand (R. 34); if the pinlifter is working it is not necessary to go between cars to open knuckles by hand

(R. 34); Stogner testified that he tried the pinlifter to one of the couplers but did not try the pinlifter to the other coupler (R. 36); it must be presumed that Stogner would not have negligently gone between cars and opened the coupler by hand after the accident unless upon a fair trial the pinlifter would not open the knuckle; ergo the mechanism was defective after the impact which injured Stewart; and ergo it must have been defective before the accident.

The same vice of pyramiding an inference on the presumption of the witness' non-negligence to overcome the equal presumption of defendant's non-negligence, and in spite of the burden of proof being on plaintiff, is obvious

in this bolstering chain of reasoning.

But it contains other vices. Stogner was a living witness with knowledge of facts. He did not testify that he gave the pinlifter a fair trial. He did not say what kind of a trial he gave it. He did not say it would not operate. He was the foreman and could have readily ascertained whether either coupler was defective. He did not testify that either was. Even if there was some defect or maladjustment of the couplers or either of them after the accident, after the impact which crushed Stewart's arm, it does not follow that there was a defect before the accident. Nothing in the evidence negatives the possibility that the impact of the two closed couplers which wounded Stewart may have caused a subsequent defective condition, if such condition in fact existed.

Since this Court does not grant certiorari to a Circuit Court of Appeals "to review evidence and discuss specific facts," United States v. Johnson, 268 U. S. 220, 227, or to review questions depending "essentially upon an appreciation of the evidence," Houston Oil Co. of Texas v. Goodrich, 245 U. S. 440, 441, or to review "particularistic applications of general rules turning upon the analysis of special states of fact" or upon "loose allegations of conflict,

^{*}He did not say how hard he tried it, or whether he gave it a fair trial. He did not say it would not work.

conflicts depending upon the petitioning counsel's peculiar view of the facts' (see Frankfurter and Hart, "The Business of the Supreme Court at October Term, 1933," 48 Harv. Law Rev. 268-269), we submit that all that this Court will have to do to pass on the present petition will be to consider the "appreciation" which the Court below gave to the evidence of record here on the liability issue.

When this is done, it will at once be seen that the whole effort of the petition is to have this Court substitute its own "appreciation" of evidence for that of the Court below, to have this Court "review evidence and discuss specific facts," and that all the grounds of the petitions, the statements of questions presented and the reasons relied on for granting the writ, are mere "loose allegations of conflict, conflicts depending upon petitioning counsel's peculiar view of the facts."

The Court below said on this issue (R. 439-444):

"The statute prohibits a common carrier from using or hauling 'any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of cars.' The test of compliance with these requirements is the operating efficiency of the appliances with which the car is equipped. When a violation of the act is alleged as the basis of a cause of action for damages, the question is not simply whether the coupling device as originally installed conformed to the statutory requirements, or whether the carrier has exercised proper care in keeping it in condition to function efficiently, nor whether the equipment is defective in a general sense through the negligence of the carrier. It is generally held that a violation of the statute is shown by proof that cars upon a fair trial failed to couple automatically by impact. Neither of the parties here question these generally applicable tests. Having them in mind, we shall refer to the proof.

"These couplers weigh some forty pounds each. When functioning properly, they will couple automatically by impact when either one or both couplers are open, but they will not couple automatically when both

knuckles are closed. As one faces the end of a car properly equipped with automatic couplers, on the left side is a pinlifting lever. Where both knuckles of the couplers are closed, it is necessary to prepare the car for coupling on impact by opening one of these knuckles. This, in a properly functioning coupler, may be accomplished by the use of this pinlifting lever, which extends to the outer side of the car, without the necessity of going between the ends of the cars.

"Stewart received his injuries on February 12, 1937. He was an experienced switchman sixty years old, and the switching crew of which he was a member was doing certain switching on track number 12. track extended east and west and was a straight track. The crew had a group of seventeen cars on this track, which were to be coupled together and then transferred to various industrial switch tracks. The engine was headed west, with all of the cars to be coupled east of it. About seven or eight of the cars, those nearest the engine, had been coupled together and were attached to the engine at the time of the accident. Stewart with the other switchman, was working on the north side of this track, and the engineer was on the north side of his The engineer was operating under signals from Stewart. It was about 5:40 o'clock p. m. previous to the accident, the deceased gave the engineer a back-up signal and then a stop signal. cars were coupled. Deceased walked back to the next car, gave the engineer another back-up signal and a stop signal, both of which were obeyed by the engineer. This left an opening between the seventh and eighth car, and there had been no effort to make this coupling by impact prior to the time the car was stopped, leaving an opening between it and the car to which it was to be coupled. After the car had been stopped pursuant to deceased's signal, he stepped into the space between the two cars and a little later the engineer heard him 'holler,' and although the engineer had not moved the cars that had been coupled together after deceased gave the stop signal, there was nevertheless a collision between the two cars, and deceased's arm was crushed between the couplers of the two cars. Obviously, the car east of the opening must have been shunted west by contact with some force from the east, although the

record is silent on this question, and no cause of ac-

tion is predicated upon that fact.

"The available pin lifter lever was on the north side of the west end of the car east of the opening. That was the only pin lifter available to the deceased on the north side of the cars in the opening between the two. It was the duty of the deceased to use the pin lifter in opening the knuckle of the car so as to prepare it for impact. C. & O. R. Co. v. Charlton, 4 Cir., 247 F. 34. There is no evidence that he did so. The engineer, who was taking his signals from the deceased, testified that, 'There was no obstruction between me and him when he gave me the stop signal and went between the cars.' The visibility was 'pretty clear,' and deceased signalled with his hand, which the engineer could see. He testified that he did not notice deceased attempt to use the pin lifter before he went in between the cars, although he was looking at deceased for signals all the This would seem to be proof of a negative as nearly as such proof could be made. The engineer who was in position to see and whose business it was to observe what movements the deceased made, testified that he did not see him attempt to use the pin lifter. The effective use of the pin lifter requires a visible effort which could scarcely have gone unnoticed had it been made. The knuckle to be opened weighs some forty pounds. As said by us in *Chicago*, M. St. P. & P. R. R. Co. v. Linehan, 66 F. 2d 373:

"'If plaintiff failed to operate the coupler in a proper manner, the fact of its not working would be no evidence of defect. Just how much force may be necessary in operating the pin lever in order to bring about an opening of the knuckle cannot be definitely There is no accurate measuring stick. pull of the lever might be sufficient if enough force were put behind it, and there might be as much force exerted in one pull as in two or three. The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition? A court cannot say that one pull upon the lever and failure of the same to respond, regardless of the force used or the manner of operation, is sufficient to show a

defective coupler, nor can it say on the other hand that one pull can never be sufficient to show reasonable force.'

"The point we are here making is that had the deceased made the attempt to operate the pin lifter, his efforts, under the circumstances, could not have escaped the observance of the engineer who was a witness for the plaintiff. The burden of proof was, of course, upon the plaintiff. There had been no previous unsuccessful attempt to make this coupling by impact, which might have been some evidence of insufficiency or defect. It is argued that deceased was excused from any effort to prepare the coupler for impact by use of the pin lifter because it is said there was evidence that the pin lifter did not respond. This contention is based upon the testimony of the switchman Stogner. He testified as follows:

"'Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident?

" 'A. I did ..

"'Q. How did you open the knuckle?

"A. I opened it with my hand.

"'Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?

" 'A. No, sir.'

"He testified that after the accident he found both

knuckles of both couplers closed.

"There was no evidence of mechanical defect or insufficiency in the couplers, including the pin lifter. There was no evidence of an unsuccessful attempt to couple them by impact when prepared for coupling. The testimony of the foreman that he opened the knuckle with his hand does not indicate that there was a defect in the coupling device. His testimony that it is not necessary to go in between the cars to open the coupler with one's hands, if the coupler or pin lifter is working automatically, adds nothing to the proof as to the condition of the couplers on these cars. It certainly does not prove that the coupler or pin lifter on this particular car did not operate satisfactorily. On cross-ex-

amination the witness was asked which knuckle he tried to open or which pin lifter he tried to use, and he answered, 'The one on the north side.' But he does not testify that he was unable to open the knuckle by use of the pin lifter, nor what, if any, effort he made so to do. It must be remembered that this incident occurred after the accident and after deceased's arm had been crushed in the coupler. What effort he made to open the knuckle by use of the pin lifter, or what force he applied, finds no answer in this record but is left to conjecture. Did he make an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner,' and did he make application of 'enough force to open the knuckle if the coupler was in proper condition'? It does not even appear whether this 'try' to open the knuckle came after the knuckle was opened or before. A very essential element is left to conjecture and speculation. " * where proven facts give equal support to each of two inconsistent inferences; *** neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other * * . Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333; Wheelock v. Freiwald, 8 Cir., 66 F. 2d 694. Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict can not be permitted to stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence. Midland Valley R. Co. v. Fulgham, 8 Cir., 181 F. 91.

"There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the defendant's motion for judgment in its favor notwithstand-

ing the verdict."

ARGUMENT.

POINT ONE.

THE "QUESTIONS PRESENTED," AS STATED IN THE PETITION, DO NOT PROPERLY ARISE ON THE RECORD. THEY ARE BASED ON ASSUMPTIONS OF COUNSEL FOR PETITIONER AS TO SPECIAL STATES OF FACT, NOT BORNE OUT BY THE EVIDENCE, AND UPON MISINTERPRETATIONS OF THE HOLDING BY THE COURT BELOW. THE "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT" ARE SUBJECT TO THE SAME VICES.

A reading of the pertinent portion of the last opinion of the Court below, which we have quoted at length above, pp. 13 to 17, will be sufficient to show that the "Questions Presented," and that the "Reasons Relied on for Allowance of the Writ," as stated in the Petition, do not properly arise upon the record and upon the holding of the Court below, but are shot through with counsel's assumptions of states of fact contrary to the evidence and embody "loose allegations of conflict, conflicts depending upon petitioning counsel's peculiar view of the facts."

The very basis of the petition is contained in the first "Question Presented," as stated on pages 8 and 9 of the petition. The statement of that question contains three basic assumptions wholly contrary to the record. They

are:

1. That the deceased was injured "while between two freight cars trying to open the knuckle of the coupler of one of them by hand in order to prepare the coupler for coupling by impact."

2. That the Court below held, under the above (unwarranted) assumption of fact that "the plaintiff, in order to make a case for the jury, must adduce the testimony of an eyewitness to the casualty, affirmatively showing that the deceased employee tried to open the knuckle by operating the lever of the pin lifter at the side of the car before going between the cars to open the same by hand,"

3. And that the Court below made that (assumed) holding "though evidence be adduced to support a finding that the pin lifter was not in efficient working order."

The first above assumption of fact is not borne out by any evidence whatsoever. There was no evidence as to why Stewart went between the cars. There was no evidence that he went there for the purpose of trying to open the knuckle of the coupler by hand. The assumption that he did so is a pure assumption of counsel, based "wholly upon conjecture or surmise," as the court below indicated. (R. 444.)

The second above assumption (as to law or legal inference) is not supported by the record or by the holding of the Court below and is a purely gratuitous reading into the opinion below of something neither said nor held, as well as being wholly based upon the unwarranted factual

assumption just above outlined.

The Court below did not hold that the plaintiff, in order to make a case for the jury, must adduce the testimong of an effewitness that the deceased tried to open the knuckle by operating the pin lifter before going between cars to open the knuckle by hand. The court said nothing about the necessity of any eyewitness. It was dealing with a case in which there was a total absence of direct evidence of any defect in the coupler mechanism and a total absence of evidence that the mechanism had failed to work on any previous trial. The gist of the holding below was, as shown by the Court's opinion, that where there is no direct evidence of mechanical defect and no evidence that the mechanism failed to operate properly on any trial prior to the injury, and where plaintiff, in support of the allegation of safety appliance defect, relies entirely on the theory that the appliance failed to operate upon a fair trial by the injured employee, then the burden is on plaintiff to prove by sufficient evidence (it did not say by an eyewitness) that the employee gave the mechanism a fair trial and that,

upon such fair trial, the mechanism did not work properly. The correctness of this holding seems so obvious as not to need argument.

Here there was an entire lack of any evidence (whether by eyewitness, circumstantial or otherwise) either (1) that Stewart gave the pin lifter mechanism a fair trial before he went between the cars, or (2) that upon such fair trial the mechanism failed to work. Indeed, the proof of record is that Stewart did not give the mechanism a trial at all. The engineer was watching Stewart all the time for signals; he repeatedly saw his hand signals; the visibility was good and he was bound to have seen the effort of Stewart to open the forty-pound knuckle by use of the pin lifter, if he made such effort; yet the engineer did not see him make any such effort. As the Court below cogently observed:

"This would seem to be proof of a negative as nearly as such proof could be made. The engineer who was in a position to see and whose business it was to observe what movements the deceased made, testified that he did not see him attempt to use the pin lifter. The effective use of the pin lifter requires a visible effort which could scarcely have gone unnoticed had it been made. The knuckle to be opened weighs some forty pounds." (R. 441.)

On this central fisue the plaintiff sought to fill in the entire absence of any evidence that Stewart gave the mechanism a fair trial and that upon such fair trial it would not work, and to get away from the direct evidence of the engineer that Stewart did not give the mechanism any sort of trial, by relying entirely on a presumption that Stewart would not have negligently gone between cars without giving the mechanism a fair trial and without ascertaining that it would not work upon such a fair trial.

Thus plaintiff's whole case was grounded upon the vice of basing an inference on a presumption of the deceased's non-negligence, overlooking the fact that an equal and countervailing presumption of non-negligence attends the defendant, and overlooking entirely the burden of proof

v. Metropolitan Railroad Co., 200 U. S. 480, 487-488, as the Court below expressly held in its first opinion. (R. 411)

Moreover, plaintiff rested the case wholly on such an inference pyramided on a presumption, in the teeth of the direct evidence of the engineer proving that Stewart did

not give the mechanism any trial at all.

The third vice in the statement of the first "Question Presented," as stated in the petition, is that it ends with an assumption that the holding wrongly attributed to the Court below was made "though evidence be adduced to support a finding that the pin lifter was not in efficient working order."

There was no evidence to support a finding that the pin lifter was not in efficient working order at the time of the accident. The evidence to which petitioner refers is that of Stogner, the foreman, which dealt exclusively with what happened after the casualty had occurred. The court below dealt with this evidence so fully and with such obvious soundness (R. 442-443) that argument seems unnecessary to add to what was there said.

Stogner testified that after the accident he made the coupling, that he opened a knuckle by hand, that it is not necessary to go between cars to open the knuckle by hand if the coupler is working automatically, and that he "tried" one pin lifter. He did not say what kind of a trial he gave it. As the court below said (R. 443), "What effort he made to open the knuckle by use of the pin lifter, or what force he applied, finds no answer in this record but is left to conjecture." He did not say it would not work automatically. He did not say it would not open the knuckle. He did not even say that the pin lifter which he "fried" was the one connected to the particular knuckle which he testified he opened by hand. He did not say that the mechanism was defective or out of adjustment in any way. He did not say it was necessary for him to go between cars and to open the knuckle by hand because the pin lifter, when he tried it. would not operate it.

Moreover, Stogner's testimony related entirely to time subsequent to the collision of the two closed coupler knuckles which crushed Stewart's arm. Even if the mechanism was defective or out of adjustment when Stogner gave his "try" to one pin lifter (and there is no evidence that it was) there is nothing in his testimony inconsistent with a theory that the impact which injured Stewart may also have injured the couplers or thrown the mechanism out of adjustment. Another entirely plausible theory, entirely consistent with absence of any safety appliance defect even after the accident and when Stogner gave his "try" to one

a lifter, is that when the two closed couplers came together and crushed Stewart's arm they may have remained so close together that no amount of effort on a pin lifter would open a knuckle, however perfect the mechanism might be, because the closed coupler of the other car was too close to allow room for the knuckle to open without separating the two cars. Obviously no man could open a coupler knuckle by lifting the pin lifter, not only against the forty-pound inertia of the knuckle itself but also against the weight of another freight car standing with its closed coupler too close to the first coupler to leave room for the opening of the knuckle.

Furthermore, as the Court below observed, it did not even appear whether Stogner's "try" of one pin lifter came after the knuckle was opened or before. "A very essential element is left to conjecture and speculation," said the Court. (R. 443.)

It follows that Stogner's entire testimony was no evidence "to support a finding that the pin lifter was not in efficient working order" as assumed in Question One, certainly at the time of the preceding accident. Not the least of the defects in petitioner's reasoning is that it goes, as to Stogner's testimony, wholly on the fallacy of arguing an assumed past condition from an equally assumed subsequent condition.

Obviously the effort to bolster the evidence of Stogner by drawing an inference that he found a safety appliance defect from a presumption that he would not negligently have gone between cars to open a knuckle by hand unless he gave the pin lifter a fair trial and found it would not work, is just as vain as is the effort to draw a like inference from a presumption of the non-negligence of the deceased Stewart.

The Court below completely summarized the case when it said, at the end of its second opinion below (R. 443):

"Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict can not be permitted to stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence."

The statement of the Second "Question Presented" (Petition, 9) is subject to the same vices as the first. In it counsel seek to question whether "it will be presumed, in the absence of evidence to the contrary, that deceased employee did not subject himself to the risk of injury by going between the cars to open the knuckle by hand without first having tried to use the pin lifter for that purpose." This again assumes, without any evidence to that effect, that Stewart went between the cars for the purpose of opening the knuckle by hand. And it assumes that there was no evidence that he went between cars without first having tried to use the pin lifter for that purpose, when the only pertinent evidence in the record, as pointed out by the court below, that of the engineer, proved that he did go between cars (for some undisclosed purpose) without making any effort to use the pin lifter to open the knuckle.

The question further contains the same vice of seeking to base an inference of defendant's negligence wholly on a presumption that plaintiff's intestate would not have done a negligent thing, overlooking the equivalent presumption of defendant's non-negligence. It wholly overlooks also the

burden of proof.

The Third "Question Presented" (Petition, 9-10) is simply a restatement in another form of the same propositions contained in Questions One and Two, contains the same unwarranted assumptions and the same defects of reasoning.

The Fourth "Question Presented" (Petition, 10) is merely a generalized summary of the propositions contained in the other three questions, with the same unwarranted assumptions implicit and depending upon the same

defects of logic.

It is obvious that the "Questions Presented" as stated in the petition do not properly arise upon the record or

upon the holding by the Court below.

The "Reasons Relied on for Allowance of the Writ" (Petition, 10-13) are merely restatements in more detail of the same propositions contained in the "Questions Presented," with the same erroneous assumptions as to the state of the evidence and with the same misconceptions as to what the Court below actually held, coupled with "loose allegations of conflict" with unnamed decisions of this Court and of other Circuit Courts of Appeals, "conflicts depending upon the petitioning counsel's peculiar view of the facts."

The reasons, so stated, present no substantial question of conflict of authority and no reason for the exercise by this court of its supervisory jurisdiction by certiorari. Even conflicts between circuits is a basis for certiorari only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393.

The present case, as this Court said of the case just cited (261 U. S. at 393), "certainly comes under neither head." It presents no question of law of importance to the public

as distinguished from the litigant. It presents no real and embarrassing conflict of authority. The case is factual and

turns on appreciation of particular evidence.

The petition, by making assumptions of fact contrary to the record, and by putting the petitioning counsel's own peculiar interpretation on the evidence, rather than dealing with the interpretation put upon it by the Court below, seeks only to have this Court substitute its appreciation of particular states of fact and of evidence for that of the Court below, in order that petitioner may have a new trial and a new chance to recover damages for non-dependent collaterals (the only dependent, the widow, being dead) and fees for counsel, in a case which the widow-administratrix herself settled in her lifetime for a very substantial sum, under express authority and approval of the Probate Court of her State whose appointment as administratrix she held.

POINT TWO.

THE DECISION BELOW WAS RIGHT AND IN ACCORD WITH DECISIONS HERE AND IN THE OTHER CIRCUITS. NO CONFLICT OF AUTHORITY IS INVOLVED.

A reading of the opinion below, particularly of that portion of it hereinbefore quoted in the Statement and which covered the issue as to liability, will be, we think, entirely

convincing as to the correctness of its holding.

The evidence, that indeed of plaintiff, affirmatively shows, as the court below held, that petitioner's intestate did not use or attempt to use the pin lifter before going between the cars. The holding of non-liability, therefore, is strictly in accord with Chesapeake & O. Ry. Co. v. Charlton (C. C. A. 4th), 247 Fed. 34, certiorari denied 249 U. S. 614; Charlton v. Chesapeake & O. Ry. Co. (C. C. A. 4th), 256 Fed. 988; see also Pennsylvania R. Co. v. Jones (C. C. A. 6th), 300 Fed. 525.

Plaintiff's whole case rested upon an evanescent presumption that Stewart would not negligently have gone between cars without first making a fair trial to open the coupler by lifting the pin lifter. Even if such a presumption could be indulged, which we deny in view of the equivalent presumption of non-negligence of the defendant and in view of the burden of proof on plaintiff, still such presumption vanished upon the advent of plaintiff's own evidence that the engineer was watching Stewart all the time for signals and acted upon his signals more than once, that the visibility was clear, that he saw Stewart's hand and saw his hand signals, and that he did not notice Stewart make any effort to use the pin lifter before he went in between cars. The decision below is thus strictly in accord with Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333; and Southern Railway Co. v. Walters, 284 U. S. 190:

The decision below is in accord with universal holdings here that unsubstantial evidence, sufficient only to raise a speculation or surmise on an issue of liability, cannot support a verdict. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333; Southern Railway Co. v. Walters, 284 U. S. 190;

Atchison, T. & S. R. Co. v. Toops, 281 U. S. 351.

The decision below is strictly in accord with uniform holdings here that where evidence tends equally to sustain either of two inconsistent inferences or hypotheses, each equally consistent with all the evidence, neither of them can be said to have been established by legitimate proof. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333; Stevens v. The White City, 285 U. S. 195; New York Central R. Co. v. Ambrose, 280 U. S. 486; Gulf, etc. R. Co. v. Wells, 275 U. S. 455.

The decision below is in accord with the well settled rule that one presumption or inference cannot be built upon another. Laoney v. Metropolitan R. Co., 200 U. S. 480; Weekly v. Baltimore & O. R. Co. (C. C. A. 6th), 4 F. (2d) 312, 313.

Upon the entire record, the holding below that there was not sufficient evidence to go to a jury and to support a finding that an inefficient or defective coupler was the proximate cause of decedent's injury and death is strictly in accord with the holdings in Pannsylvania R. Co. v. Chamberlain, 288 U. S. 333, and in Weekly v. Baltimore & O. R. Co.

(C. C. A. 6th), 4 F. (2d) 312. .

In his brief (p. 27), retitioner seems to rely heavily on an alleged conflict between the decision below and the decision of the Supreme Court of Mississippi in Yazoo & M. V. R. Co. v. Cockerham, 134 Miss. 887, 99 So. 14. Such conflict, if it exists, is obviously no ground for certiorari here, and of course it makes no difference in this regard that this Court denied certiorari in the Mississippi case (265 U. S. 586).

A strange misconception is indulged in by petitioner when it is asserted on brief (pp. 27-30) that the ruling below constitutes a plain disregard of the proviso to Section 53 of the Liability Act (45 U. S. C. 53), providing "that no. such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee" and a plain disregard of numerous decisions of this Court to the effect that on an issue of contributory negligence a plaintiff or his decedent will be presumed to have exercised due care for his own safety.

On an issue of contributory negligence the burden is on the defendant pleading that defense. Of course the presumption is indulged that plaintiff or his intestate exercised due care and the defendant has the burden of overcoming that presumption by evidence preponderating to

show contributory negligence.

But here there was no issue of contributory negligence. The sole issue was as to defendant's negligence in maintaining a defective coupler and as to proximate cause of injury and death by such negligence. On that issue the burden was on plaintiff, not defendant. Equal and countervailing presumptions of due care attended both Stewart and

the defendant. Obviously plaintiff could not meet the burden of proof by merely relying on a presumption of due care by her intestate. The decisions of this Court cited by

petitioner have no application to our situation.

If competent and sufficient evidence by a plaintiff meets the burden of proof and establishes a safety appliance defect as the proximate cause of injury and death, then of course, under the proviso of Section 53 of the Act the employee cannot be held to have been guilty of contributory negligence. But in our case, not on an issue of contributory negligence, but on the basic issue of defendant's negligence, to argue that the holding below that plaintiff failed to meet the burden of proof to establish the alleged safety appliance defect was in error in failing to give effect to a presumption of due care on the part of plaintiff's intestate or violated the proviso of Section 53, is simply to beg the whole question as to the alleged safety appliance defect.

Petitioner assumes, without proof, that there was a safety appliance defect. From that erroneous assumption he argues, from the statute, that the deceased could not be held to be guilty of contributory negligence (which was not in issue). Then, by entire non-sequiter, petitioner seeks to base upon the presumption of deceased's non-negligence, bolstered by the statutory rule against contributory negligence where there is a violation of a safety statute, the very basic and essential hypothesis that there was a violation of

the safety statute, although not proved.

The statutory rule of the proviso against a holding of contributory negligence does not arise until a safety appliance defect has been proved as the cause of the injury. Obviously the existence of an unproved safety appliance defect cannot be predicated, as petitioner seeks to predicate it, on the statutory proviso.

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POINT THREE.

A SUFFICIENT GROUND TO SUPPORT THE JUDGMENT OF REVERSAL BELOW, ALTHOUGH NOT
PASSED UPON BY THE COURT IN ITS SECOND
OPINION, IS THAT THE SETTLEMENT AND RELEASE BY THE ADMINISTRATRIX UNDER EXPRESS AUTHORITY AND APPROVAL OF THE
PROBATE COURT OF ILLINOIS WAS BINDING
AS A BAR TO HER CAUSE OF ACTION, AND THAT
THE DISTRICT COURT BELOW WAS WITHOUT
JURISDICTION TO ENTERTAIN A COLLATERAL
ATTACK ON THE JUDGMENT OF THE PROBATE
COURT DENYING HER DIRECT ATTACK THERE
ON THE SETTLEMENT.

A probate court has power to grant administration and to authorize an administrator to settle a death claim. Its order and judgment authorizing such settlement cannot be collaterally attacked. American Car & Foundry Co. v. Anderson (C. C. A. 8th), 211 F. 301; Rowe v. Fair, 157 Miss. 326, 128 So. 87; Keanum v. Southern Ry. Co., 151 Miss. 784, 119 So. 301; Dockery v. Central, etc., Co., 45 Ariz. 434, 45 Pac. (2d) 656; Compton's Adm'r v. Borderland Coal Co., 179 Ky. 695, 201 S. W. 20; McMann v. General Acc. Assur. Corporation, 276 Mich. 108, 267 N. W. 601.

In McMann v. General Acc. Assur. Corporation, supra, it was held that an order of a probate court approving a settlement for death of an administrator's intestate was a judgment that the proposed settlement was fair and just, which was not subject to inquiry as to its sufficiency except by appeal or direct attack and could not be collaterally at-

tacked for fraud. The court said:

"Appellant argues that the probate court's action in the premises was purely permissive and that its order does not bar this action. No authority, however, is cited. We do not view the probate order of approval in this manner; it was, in effect, a judgment that the proposed settlement was fair and just, and, except by

appeal therefrom or by direct attack in equity for fraud, no other inquiry may be made into its sufficiency." (601-602, citing many cases.)

This principle holds a fortiori in our case because here the administratrix not only procured the order of the Probate Court authorizing and approving her settlement, but, after she had suffered a change of heart and sought to repudiate the settlement, she filed a direct attack on it in the same Probate Court, which, after hearing, was denied. She did not appeal from that judgment on that direct attack. She could not be heard to attack it collaterally in her liability action in the federal district court.

Federal courts must give full faith and credit to state court judgments. Article IV, Section 1, United States Constitution; Wisconsin v. Pelican Ins. Co., 127 U. S. 265; Cen-

tral Trust Co. v. Seasongood, 130 U. S. 482.

Under the law of Illinois a judgment may not be collaterally attacked where the court rendering the judgment has jurisdiction of subject matter and parties. *Matthews* v. *Doner*, 242 Ill. 592, 127 N. E. 137; *People* v. *Village*, etc., 367 Ill. 301, 11 N. E. (2d) 415.

In Illinois, probate courts have original jurisdiction of the settlement of estates and all probate matters. Illinois Constitution, Article VI, Section 20; Ill. Rev. Stat., State Bar Ass'n Ed. 1937, p. 52; *Ibid*, Sec. 303, chapter 37, p. 1023; *Helea* v. *Verne*, 343 Ill. 325, 175 N. E. 562. In some matters it has equitable jurisdiction, *In re Schmitt's Estate*, 288 Ill. App. 250, 6 N. E. (2d) 444.

The jurisdiction of state probate courts, under the Federal Employers' Liability Act, has been recognized by this court. Central. etc. Ry. Co. v. White, 238 U. S. 507.

Federal courts recognize and enforce the orders, judgments and decrees of the probate courts of a state. Williams v. Benedict, 8 How. 107, 111; Veach v. Rice, 131 U. S. 293; Christianson v. King County, 239 U. S. 356, 372-3; O'Conner v. Stanley (C. C. A. 8th), 54 F. (2d) 20, 24, 26.

Under the law of Illinois, the orders and judgments of a probate court, where it has jurisdiction of the subject matter and the parties, cannot be attacked collaterally. Balsewicz v. Railroad, 240 Ill. 238, 88 N. E. 734; Baker v. Brown, 372 Ill. 336, 23 N. E. (2d) 710; Kattleman Estate v. Guthrie's Estate, 142 Ill. 357, 31 N. E. 589; Ammons v. The People, 11 Ill. 6; Gillette v. Wiley, 126 Ill. 310, 19 N. E. 287; Moffitt v. Moffitt, 69 Ill. 641; People v. Pacific Surety Co., 130 Ill. App. 502; Schottler v. McArdle, 174 Ill. App. 125; Ford v. Ford, 117 Ill. App. 502; Gearty v. L. Fish Furniture Go., 289 Ill. App. 538, 7 N. E. (2d) 493.

Petitioner's petition in the District Court below comprehended both an action for wrongful death and an action for conscious pain and suffering of deceased before his death. The latter was strictly an asset of his estate and the Probate Court had full jurisdiction to render judgment with respect to it. 45 U. S. C. 51, 59; Great Northern Ry. Co. v. Capital Trust Co., 242 U. S. 144; St. Louis, etc., Ry. Co. v. Craft, 237 U. S. 648; Taylor v. Taylor, 232 U. S. 363; Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59; Wilcox v. International Harvester Co., 278 Ill. 465, 116 N. E. 151.

Clearly the judgments of the Probate Court of Illinois could not be collaterally attacked in the Federal District Court in Missouri below, nor could they be ignored, as they were ignored by that Court. Lion Bonding Co. v. Karatz, 262 U. S. 77, 88-90.

For this reason, if for no other, the Court of Appeals below should have reversed the judgment of the District Court and the judgment of reversal, though based wholly on other grounds, was right.

POINT FOUR.

EVEN IF THE COLLATERAL ATTACK ON THE JUDGMENTS OF THE PROBATE COURT OF ILLINOIS
COULD BE ENTERTAINED IN THE DISTRICT
COURT BELOW, THERE WAS NO SUFFICIENT
EVIDENCE OF FRAUD OR DURESS IN THE INDUCEMENT OF THE SETTLEMENT AND RELEASE TO AVOID THE RELEASE AND THE
JUDGMENT OF THE DISTRICT COURT SHOULD
HAVE BEEN REVERSED ON THAT GROUND.

We deem the present brief in opposition to certiorari hardly the appropriate occasion to deal with the record evidence bearing on the issue of fraud or duress in the inducement of the settlement and release. There was no effort by plaintiff to prove fraud or misrepresentation. The whole issue revolved around a very tenuous theory of duress applied not directly to the plaintiff administratrix but claimed to have been applied to her son-in-law, one Hamm, who, incidentally did not testify in support of the issue, though he was available. (See the discussion of this issue in the first opinion of the court below, R. 403-407, 410.) The Court below did not pass on this issue in its second opinion.

We wish here merely to reserve the right to show, if it should become necessary to meet this case on the merits in this Court, and we should confidentially expect in such case to show, that the evidence in support of the allegations of fraud and duress in the inducement of the settlement and release was not only "not strongly in support of the charge," as the Court below declared in its first opinion (R. 410), but was utterly insufficient to support a verdict and judgment setting aside the release or disregarding it

as a complete bar to plaintiff's cause of action.

CONCLUSION.

It is submitted that no sound grounds for certiorari are presented in the petition; that no question of conflict of authorities is presented; that the decision below is in harmony with, and not in conflict with, controlling decisions here and apposite decisions of other circuit courts of appeals; that the decision below was right on the ground upon which the Court below based it and on other grounds not passed upon; and that the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

· No. 161.

Clarence A. Stewart, Administrator of the Estate of John R. Stewart, Deceased, Petitioner,

V.

Southern Railway Company, a Corpoyation, Respondent.

BRIEF FOR RESPONDENT.

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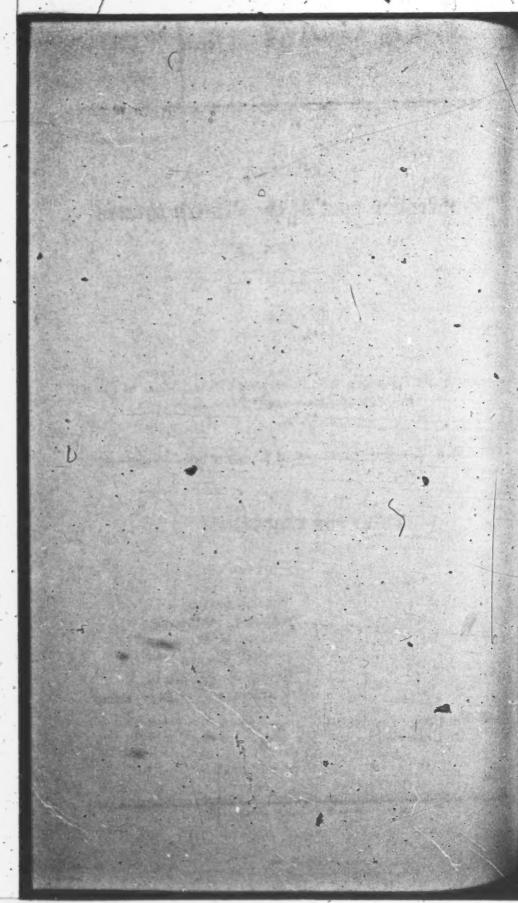


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Point Six—Eliminating wholly incompetent evidence admitted over objection and exception, and the admission of which was assigned for error below, there was no sufficient evidence to sustain the verdict finding that the settlement and release by the administratrix was induced by duress and setting aside the release. The release was therefore a bar to the action and the judgment of the district court should be reversed with directions to enter judgment for respondent non obstante veredicto

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IN THE

Supreme Court of the United States

Остовив Тивм, 1941.

No. 161.

CLARENCE A. STEWART, Administrator of the Estate of John B. Stewart, Deceased, Petitioner,

SOUTHERN RAILWAY COMPANY, a Corporation, Respondent.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion to review which this Court granted certiorari on October 13, 1941, that is, the last opinion below of the United States Circuit Court of Appeals for the Eighth Circuit, is reported in 119 F. (2d) 85 and will be found in the record beginning at page 436.

A previous opinion of the same court, rendered on November 1, 1940, is reported in 115 F. (2d) 317 and will be found in the record beginning at page 402.

STATUTES INVOLVED.

The action was brought in the district court below under the Federal Employers' Liability Act (Act of April 22, 1908, ch. 149, 35 Stat. 66, as amended by the Act of April 5, 1910, ch. 143, 36 Stat. 291, 45 U. S. C. 51-59) for damages for the alleged wrongful death of petitioner's intestate and also for damages for the intestate's conscious pain and suffering prior to his death. (R. 2-4.) However, the sole asserted basis for recovery was an allegation of violation by respondent of the automatic coupler provision of section 2 of the Safety Appliance Act (Act of March 2, 1893, ch. 196, 27 Stat. 531, as amended by the Act of April 1, 1896, 29 Stat. 85, ch. 87, and by the Act of March 2, 1903, 32 Stat. 943, ch. 976, 45 U. S. C. 2), (R. 3) which section accordingly is particularly involved and which provides:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

THE SCOPE OF THIS COURT'S REVIEW.

The case is in a peculiar posture which makes it difficult to determine just what should or may be the scope of this Court's review on certiorari.

In its first opinion, in 115 F. (2d) 317 (R. 402-411), as we pointed out in detail in our brief in opposition to certiorari (pp. 7-8), the Court of Appeals below held with petitioner and against respondent on the liability issue, on the issue as to res judicata and collateral attack, and on the issue as to duress. It held with respondent and against petitioner as to error in the district court's charge. (R. 411.) The judgment which it then entered (November 1, 1940) reversed the district court's judgment in favor of petitioner and remanded for new trial on account of this error in the charge. (R. 412.)

Petitioner did not seek review of that judgment in his petition for certiorari. Indeed that judgment could hardly be reviewed, since the Court of Appeals below, on petitions for rehearing by both parties, itself vacated and set aside that judgment by its order of December 7, 1940, granting rehearing and vacating the judgment of November 1, 1940. (R. 435). Neither party sought review of the order of December 7, 1940.

The action of the court below in setting aside its judgment of reversal and remand of November 1, 1940, and in granting rehearing of the case on the entire record, necessarily had the effect of setting aside its opinion of November 1, 1940, or of leaving it without legal significance as a decision.

In its second opinion, on the rehearing, rendered April 14, 1941, 119 F. (2d) 85 (R. 436-444), the court below dealt with and passed upon only the liability issue, the question of the sufficiency of the evidence to support the finding by the jury of a violation of the automatic coupler provision of the Safety Appliance Act. It held the evidence insufficient to support the verdict (R. 444) and entered judgment on April 14, 1941, reversing the judgment of the district court and remanding with directions to grant respondent's motion for judgment notwithstanding the verdict. (R. 444.)

In view of this disposition of the case, the Court of Appeals did not find it necessary on the rehearing to deal with or pass upon any of the other issues or questions dealt with and passed on by it in its previous vacated decision of November 1, 1940, or raised by other assignments in the record. It therefore has actually and finally passed on neither the question of res judicata and collateral attack, nor the question of the sufficiency of the evidence to support the finding of duress in the settlement and release, nor the question of error in the charge of the trial court, nor on any of the other assignments in the record.

Petitioner's petition for certiorari sought review only of the last judgment of the Court of Appeals below, that of April 14, 1941. (Petition, 1, 13-14.) The "questions presented" and the "reasons relied on for the allowance of the writ" dealt solely with the holding in that judgment that there was insufficient evidence of a safety appliance defect to support the verdict and the judgment of the district court. (Petition, 8-10, 10-13.) The brief in support of petition for certiorari was devoted solely to that judgment and to those questions. (Pp. 15-35.) Presumably this Court granted certiorari solely to review that judgment and the question of liability on the evidence under the Safety Appliance Act for use of an alleged defective coupler mechanism, which was presented by the petitioner as "an important question of federal law which has not been, but should be, settled by this Court:" (Petition, 10, 11.)

In our brief in opposition to certiorari we indicated that respondent relied, in opposition to certiorari, and would rely in support of the judgment below, if certiorari were granted, on other grounds in the record pressed upon the Court of Appeals below but not dealt with by it in its opinion and judgment now under review, any one of which, if ruled in favor of respondent, would support the same judgment of reversal and remand with instructions to grant respondent's motion for judgment non obstante veredicto, to-wit the defenses of settlement and release, of res judicata and collateral attack, and of insufficiency of the evidence to support the verdict setting aside the release on the ground of duress. (Brief in Opposition, 9-10, 29-32.)

That a respondent in certiorari may, without cross petition for certiorari, rely on such grounds in the record in support of the judgment under review, although the court below did not decide such grounds nor base its judgment upon them, whereas the petitioner in certiorari is ordinarily confined to grounds asserted in, his petition as grounds for reversal, is clear. United States v. American Ry. Ex. Co., 265 U. S. 425, 435; Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 560; Langues v. Green, 282 U.S. 531, 535; Helvering v. Gowran, 302 U.S. 238, 245; Ticonic Nat'l Bank v. Sprague, 303 U. S. 406, 410, Note 3; LeTulle v. Schofield, 308 U. S. 415, 421; McGoldrick v. Compagnie Gen. Transatlantique, 309 U.S. 430, 434 Compare, as to petitioner, Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, and cases there cited.

We suppose that when we indicated in our brief in opposition to certiorari our intention to rely, in support of the judgment below, on our defenses of settlement and release, res judicata and collateral attack, and insufficiency of evidence to support a finding of duress in the inducement of the release and settlement, we opened up those questions so as to entitle petitioner to present his opposing contentions on those questions, even though he had not raised them by his petition. This petitioner does in his "Supplemental Statement, Brief and Argument." (Pp. 12, 13-22.)

However, petitioner's supplemental brief goes much further than that. It relies on the holding in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, and asks this Court not only to review the decision by the court below in its first opinion and judgment of November 1, 1940, that there was reversible error in the district court's charge (Brief, 12-13, 23-25) but also to examine all of respondent's assignments of error in the court below, to hold all of them without merit, and upon the whole record to reverse the judgment of the Court of Appeals below and to affirm the district court's judgment in favor of petitioner.

Of course, we do not question this Court's power to decide all questions in the record upon the whole record, without leaving anything to be decided by the Circuit Court of Appeals. It did just that in Story Parchment Co. v. Paterson Parchment Paper Co., supra. Under Section 240 of the Judicial Code (28 U. S. C. 347) this Court has power, in any case, civil or criminal, in a circuit court of appeals, by certiorari, either before or after judgment by such lower court, to determine the entire cause with full power and authority, and with like effect, as if the cause had been brought here by unrestricted appeal, or as if it had never gone to the Circuit Court of Appeals.

However, we do not understand that this Court makes a practice of exercising such admitted power generally in certiorari cases. Langues v. Green, 282 U. S. 531, 538, drew the distinction between the distinction of the d

the distinction between power and practice.

And we understand that it is still the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases coming from the federal courts that it considers questions urged by a petitioner or appellant not pressed or passed upon in the court below, McGoldrick v. Compagnie Gen. Transatlantique, 309 U. S. 430, 434, citing Blair v. Oesterlein Mach. Co., 275 U. S. 220, 225, and Duignan v. United States, 274 U. S. 195, 200, and that it will not on certiorari consider on behalf of petitioner questions not disclosed or raised by the petition and which, if disclosed, would not have moved it to grant certiorari, Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 509, citing Furness, W. & Co. v. Yang-Tsee Ins. Asso., 242 U. S. 430, and Layne & B. Corp. v. Western Well Works, 261 U. S. 387.

We do not believe this Court would have granted certiorari in this case to review the judgment of the court below of November 1, 1940, holding that there was reversible error in the district court's charge, if that had stood as the final decision of the court below, or to examine the entire charge to find whether, if there was error in the portion of the charge found by the court below to have been erroneous, it may or may not have been cured in other portions of the charge.

Nor do we believe that this Court would have granted certiorari to review the record and to determine the question whether there was sufficient evidence of duress to support a finding voiding the settlement and release by the administratrix.

Therefore, if the Safety Appliance Act question, upon which certiorari was sought and granted, which is the only question determined by the court below in the judgment now under review, should be determined against respondent and in favor of petitioner, we should expect this Court to reverse the court below on that question and to leave it free to pass finally on the question of errors in the charge and on the sufficiency of evidence as to duress and on other assignments of error in the record not previously passed upon by the

court below. If this Court holds with respondent on the liability, or Safety Appliance Act, question, then of course it will affirm the judgment below.

However, there is an important question of law on this record, determined against respondent by the first judgment of the court below, but vacated and pressed by us again on rehearing, but not again decided, which is of such character as we think would have moved this Court to grant certiorari to review it, whichever way it might have been decided below, because it involves an important question in the relations between state and federal courts and in conflicts of jurisdiction. See Southern Railway Co. v. Painter, decided November 17, 1941. That is the question of res judicata and collateral attack which we discussed in our brief in opposition to certiorari, pages 29-31, and which we shall discuss further herein. We rely upon that point in support of the judgment below, although the court below did not base its judgment upon it, and we ask this Court to pass upon that point, as well as upon the Safety Appliance Act liability question, whether or not it decides to follow the suggestion of petitioner and explore the entire record to pass upon all assignments raised below.

SUMMARY OF ARGUMENT.

Point One.

The decision below was right and in accord with decisions here. There was no sufficient evidence to support the verdict finding that petitioner's intestate came to his death as the result of a defective coupler mechanism.

Point Two.

In case this Court decides to review that now undecided question, there was reversible error in the trial court's charge, as held by the court below in its first, now vacated, opinion and judgment.

Point Three.

The administratrix not only made settlement and released her claim under express authorization of the probate court of Illinois which appointed her, but also, when she chose to repudiate the settlement and release, elected the remedy of a direct attack thereon for alleged fraud and duress in the said probate court. That court decided against her on the issues of fraud and duress. Its judgment is res judicata and could not be collaterally attacked in the liability action in the district court below.

Point Four.

The verdict of the jury is so indefinite as to be a nullity and in any event the judgment of the district court should have been reversed and remanded for a new trial at least, by reason of this error.

Point Five.

Numerous other assignments of error by respondent in the court below, but not passed upon by it, warrant reversal and remand for new trial at least.

- 1. Errors in instructions refused.
- 2. Errors in admission of evidence.

Point Six.

Eliminating wholly incompetent evidence admitted over objection and exception, and the admission of which was assigned for error below, there was no sufficient evidence to sustain the verdict finding that the settlement and release by the administratrix was induced by duress and setting aside the release. The release was therefore a bar to the action and the judgment of the district court should be reversed with directions to enter judgment for respondent non obstante veredicto.

ARGUMENT.

Point One.

The decision below was right and in accord with decisions here. There was no sufficient evidence to support the verdict finding that petitioner's intestate came to his death as the result of a defective coupler mechanism.

> Assignment I (1, 2, 3) (B. 349-351.) Assignment II (1, 2, 3) (B. 353-356.)

In limine, it is extremely doubtful whether the traumatic injury suffered by petitioner's intestate between the couplers actually caused his death, which occurred more than 51 hours later and the day after a surgical operation. (R. 131, 133.)

His widow, petitioner's predecessor administratrix, testified that he was a moderate drinker (R. 57) and that he drank liquor "about like ordinarily a man would drink."

(R. 175.)

His attending physician testified that he developed delirium tremens in the hospital (R. 132) and that the direct cause of his death was the delirium tremens, with a cardiac dilatation and a certain amount of shock, but that delirium tremens was the principal cause. He further testified that Stewart's wife gave him a history of Stewart's laying off work drinking and told him that Stewart had laid off and been on a drunk just prior to the day of his injury (R. 133), although Mrs. Stewart denied this on the stand. (R. 175.)

A doctor of the allopathic school of medicine, witness for plaintiff (R. 232), who did not see (R. 237) nor treat Stewart (R. 239) and who knew nothing about the case except what he learned from examining the hospital records of the case (R. 202), expressed the opinion that delirium tremens was not a cause of the death (R. 238), although he testified that men do die of delirium tremens where they have been alcoholics and have received an injury. (R. 238.)

That delirium tremens following trauma to alcoholics is frequently fatal is well attested by the medical authorities. In Cecil & Text Book of Medicine (W. B. Saunders Co., Philadelphia and London, 3rd ed., 1934) it is said:

"Trhuma may produce delirium tremens in men who have drunk large quantities of alcohol, and severe excitement or shock not infrequently produces it in individuals who have been accustomed to drink daily without becoming intoxicated. Fractures of the long bones and injury to the respiratory apparatus are apt to induce the condition, but injuries are less hiable to play an etiologic role than are infections such as erysipelas and pneumonia." (p. 572.)

And the same text, under "prognosis", says:

"Uncomplicated delirium tremens proves fatal in about 15 per cent of cases. If it is associated with such infectious diseases as pneumonia the outcome is apt to be fatal. The delirium tremens which follows trauma proves fatal in about 50 per cent of patients." (pp. 573-574.)

See also Keen's Surgery (W. B. Saunders Company, 1907), Vol. III, pp. 103-129, Witthause and Becker, Medical Jurisprudence (William Wood & Co., New York, 1894), Vol. I, pp. 514, 515, and Encyclopaedia Britannica, 14th Ed., Vol. 7, Delirium Tremens, pp. 167-168, all to the same effect.

This medical knowledge that delirium tremens following trauma may be the cause of death, finds reflection and recognition in decided cases. See Ramlow v. Moon Lake Ice Co., 192 Mich. 505, 158 N. W. 1027; Sullivan v. Industrial Engineering Co., 173 App. Div. 65, 158 N. Y. S. 970; and McCahill v. New York Transportation Co., 201 N. Y. 221, 94 N. E. 616.

From a juridical standpoint, we recognize that if a man, though an alcoholic, has not suffered delirium tremens, and if a tort feasor inflicts a traumatic injury upon him which induces delirium tremens, which in turn causes death, when the trauma would not have been fatal but for the previous alcoholic condition, the tort feasor may be liable on the

theory of proximate causation. See McCahill v. New York Transportation Co., supra.

Yet the district court below did not submit any such theory of causation to the jury. And we point out the foregoing facts not only to show that the actual cause of the death in this case was highly speculative, but also to reveal the extraordinary hardship of imposing on respondent a recovery of \$17,500, in addition to the \$5,000 which it had already paid the administratrix pursuant to a court approved settlement, on a theory of erecting an inference of a safety appliance defect in a coupler upon the presumption indulged that the deceased would not have done a negligent thing but would have acted with due care for his own protection.

Even if it were legally permissible to pile the Ossa of such an inference on the Pelion of such a presumption, how unsound a base would be such a presumption of due care in this case as applied to a man working the first day after a lay-off for a drunk, and such an alcoholic as that an ordinarily non-fatal, traumatic amputation of his forearm induced delirium tremens which caused his death

In our brief in opposition to certiorari, pp. 10-28, we discussed in considerable detail the evidence bearing on the liability issue, we quoted at length from the opinion of the court below on rehearing, in which that court carefully, analytically, and fully considered and reviewed the evidence and the authorities, and came to the conclusion that there was no substantial evidence to sustain the verdict, no substantial proof that there was any defect in the coupler mechanism within the meaning of the Safety Appliance Act, and that the plaintiff had not met the burden of proof as to the only allegation of breach of duty by respondent. We further made a brief review of authorities which we deemed pertinent. (Ibid., pp. 25-28.)

We see no reason to repeat here what was there said, but ask this Court to consider that in connection with the present brief. We shall here only undertake to supplement what was said in that brief. The court below set out certain accepted and applicable tests of violation of the automatic coupler provision of the Safety Appliance Act, which neither of the parties questioned. The last of those tests it set out as follows:

"It is generally held that a violation of the statute is shown by proof that ears upon a fair trial failed to couple automatically by impact. Neither of the parties here question these generally applicable tests. Having them in mind, we shall refer to the proof." (R. 439.) (Italics ours.)

Ultimate decision of this point should turn, we think, on whether that is a correct legal test and whether the plaintiff met the burden of proof by showing a safety appliance defect under that test.

It will be remembered that in the case at bar there was no direct evidence of any defect in the coupler mechanism and that plaintiff relied entirely on circumstantial evidence to support her allegation that the "cars were not equipped with couplers coupling automatically by impact and which could be coupled without the necessity of men going between the ends of the cars" in violation of the Safety Appliance Act "so that at the time deceased was injured it was necessary for him in the exercise of his ordinary duties as a switchman for defendant in order to couple the said cars to go between the ends of same for the purpose of coupling them "." (R. 3.)

Not only was there no direct evidence of any defect in the mechanism or that it was not in efficient operating condition, but, as the court below pointed out (R. 442) "there had been no previous unsuccessful attempt to make this coupling by impact, which might have been some evidence of insufficiency or defect."

The burden was on plaintiff, therefore, to prove that the coupler mechanism was not in proper operating condition to couple automatically by impact, without the necessity of men going between the ends of the cars to make the coupling. She undertook to prove this solely by circumstantial evi-

dence and under the settled rule, where circumstantial evidence is relied on to prove a fact, the circumstances themselves must be proved and cannot be presumed. Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472.

The mere fact that Stewart went between the cars to make the coupling, if proved or reasonably inferred from the mere fact that he went between the cars, would not prove that it was necessary for him to do so in order to make the coupling and "necessity" is the statutory word. The statute only requires a coupler coupling automatically by impact (or uncoupling) "without the necessity of men going between the ends of the cars." He may have gone between cars because he thought it was easier, or quicker to open the knuckle by hand. Or he may have done so because his head was not clear on this particular occasion. Such conduct on the part of an employee makes nothing toward proving the railroad guilty of a violation of the statute.

There being no direct proof of any defect and no direct proof that on any previous trial this coupler had failed to operate efficiently, and the plaintiff relying wholly on circumstantial evidence, it certainly was her burden to meet the test of proof laid down by the court below, that is, to prove that upon a fair trial the cars failed to couple auto-

matically by impact.

That is the test as laid by the leading text on the subject, Roberts Federal Liabilities of Carriers, 2d Ed., Vol. II, sec. 620, p. 1205, where it is said, with citation of many cases?

"It is equally true, on the other hand, that proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Applying the test of operative efficiency, the courts have generally held that a violation of the statute is shown by proof that cars, upon a fair trial, failed to couple automatically by impact, although the failure of the appliance to work was unexplained, and even though it worked efficiently both before and after the occasion in question." And again, the same author says, Vol. II, sec. 624, p. 1213, with particular reference to the pin lifter part of the device:

"If the condition of a coupler is such that the knuckles cannot be opened with the use of the pin lifter and that either of them must be opened with the use of the hand, the coupler is defective within the meaning of the statute as it will not couple automatically by impact." (Italics ours.)

Petitioner's theory in this case is that the coupler controlled by the pin lifter on Stewart's side of the train could not be opened with the use of the pin lifter and, therefore, that he had to open it with the use of his hand by going between the ends of the cars, in order to make the coupling.

But where is the proof of these facts? There is none.

The circumstantial theory upon which petitioner relies is that Stewart must have tried to open the knuckle with the use of the pin lifter, that he must have made a fair trial of the pin lifter, that he must have found on such fair trial that he could not open the knuckle with the pin lifter, and therefore must have gone between the ends of the cars to open the knuckle by hand, because he had to make the coupling and could not open the knuckle by the use of the pin lifter on a fair trial of that device in the usual method of its operation. The circumstantial theory would be sound if there were proof of the circumstances relied upon. But there is complete absence of proof of the circumstances. The theory rests entirely upon presuming the circumstances.

The only fact that is proved is the mere fact that Stewart went between the ends of the cars while engaged in accoupling operation. From the proof of this fact it possibly may reasonably be inferred that he went between the cars in order to open one of the knuckles so as to make the coupling.

But the mere proof of this fact, with all reasonable inferences that can be drawn therefrom, cannot establish that Stewart tried to open the pin lifter before he went between the cars, or that, assuming that he tried it, he gave it a fair trial, or that it would not work upon a fair trial in accordance with the ordinary method of operation. Every one of these circumstances must be presumed. There is no proof of them.

As we pointed out in our brief in opposition to certiorari, whatever proof there was in the case tended solely to disprove all of the circumstances referred to in the last paragraph. It will be recalled that the plaintiff used the engineer as her witness. The engineer testified (R. 441), as the court below pointed out, that he was taking his signals from the deceased; that there was no obstruction between him and the deceased when the latter gave the engineer the stop signal and went between the cars; that the visibility was "pretty clear"; that the deceased signaled with his hand, which the engineer could see; that the engineer was looking at the deceased for signals all the time; and that he did not notice the deceased attempt to use the pin lifter before he went in between the cars.

As the court below said (R. 441), "this would seem to be proof of a negative as nearly as such proof could be made.

The effective use of the pin lifter requires a visible effert which could scarcely have gone unnoticed had it been made. The knuckle to be opened weighs some forty pounds."

In that connection the court below cited its own decision in Chicago, M. St. P. & P. R. R. Co. v. Lineham, 66 F. (2d) 373, in which case it made an elaborate review of decisions of this Court, of the lower federal courts, and of various state courts, under the automatic coupler provision of the Safety Applicance Act. And in that case the court held that if the plaintiff failed to operate the coupler in a proper manner, the fact of its not working would be no evidence of defect; that just how much force may be necessary in operating the pin lever in order to bring about an opening of the knuckle cannot be definitely stated; that there is no accurate measuring stick; that one pull of the lever might be sufficient

if enough force is put behind it, and there might be as much force exerted in one pull as in two or three. But the court held that the ultimate question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition?

We submit that the holding by the court below in the Lineham Case, as well as its holding in this case, is absolutely sound; that in a case of this character the burden is on the plaintiff to prove that the deceased tried to open the knuckle by the use of the pin lifter before he went between the ends of the cars, that he gave it a fair trial, that he made an earnest and honest effort to operate the coupler in an ordinary and reasonable manner and applied enough force to the pin lifter to open the knuckle if the coupler was in proper condition, and that upon such trial the device would not operate. Unless all of these facts are proved no possible inference of a defective coupler within the meaning of the statute can be drawn from the mere fact that the injured employee went between the ends of the cars to adjust the coupler.

In our case none of these facts was proved and the evidence of the engineer, petitioner's own witness and the only eye-witness, has no other tendency except to negative the fact that Stewart made any effort to open the knuckle by use

of the pin lifter.

If, under these circumstances, an inference of a defect in the coupler can be drawn from the mere fact that the employee went between the ends of the cars, or from superimposing such an inference upon a basic presumption of non-negligence of the employee, that is that he would not have gone between the ends of the cars unless he had made a fair effort to open the knuckle by use of the pin lifter and such effort had failed, then section 2 of the Safety Appliance Act ceases to be an automatic coupler act and becomes merely an automatic liability act. If this can be held, there is no burden on the plaintiff in a case of this kind to prove

that the defendant has violated section 2 of the Act, no burden to prove that the coupler mechanism was defective.

If petitioner's theory in this case is sound, then a railroad As automatically liable in every instance in which an employee goes between the ends of cars to adjust a coupler knuckle and is injured, and without any proof at all that the coupler device was defective or that the knuckle could not be opened in the ordinary and usual manner by a proper effort to operate the pin lifter. This is necessarily so because, if petitioner's theory is sound, then in every such case, just as in this case, the court must indulge the basic presumption that the employee would not have done a negligent thing, must presume that he would not have gone between the cars without first making a fair and sufficient effort to operate the device by use of the pin lifter and without finding that upon such fair effort that he could not open the knuckle by use of the pin lifter. In every such case, then, as in this case, an inference of a safety appliance defect will be pyramided upon a presumption of the non-negligence of the employee, and absolute liability of the railroad will follow from proof of nothing except the fact that the employee went between the ends of the cars and that he sustained an injury as the result.

No such rule of law can be drawn from any of this Court's

decisions under the Safety Appliance Act.

In the leading case of Johnson v. Southern P. Co., 196 U. S. 1, there was clear proof that, as this Court stated on page 20:

"In the present case the couplings would not work together, Johnson was obliged to go between the cars, and the law was not complied with." (Italics ours.)

Certainly the Court in the Johnson Case considered that the burden of proof was on the plaintiff to show that the couplers would not work.

In Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 583, there was clear proof that "owing to a defect in the coupler in the eastern end of the two cars attached to the engine, the coup-

ling could not be made without a man going between the ends of the cars." The Court in that case treated that as one of the undisputed facts in the case. It certainly did not consider that that fact could be merely presumed in the absence of proof.

Chicago, B. & Q. Ry. Co. v. United States, 220 U. S. 559, held that the duty imposed by the Safety Appliance Act is absolute, but it contained no suggestion that a court could presume the fact of violation of the statute or could base a finding of such fact on an inference based on a presumption of the plaintiff's due care.

In Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Popplar, 237 U. S. 369, 370, there was testimony that the decedent attempted to uncouple the head car; that he tried repeatedly to do this by pulling the coupler pin with the lifter at the end of the next car, but without success, and that then, stepping between the two cars, while they were moving at the rate of about four miles an hour, in order to effect the uncoupling by hand, he was run over and killed. Further, in that case (p. 370), the conductor, who examined the coupling mechanism soon after the accident, testified that it worked with difficulty and that he would have reported it as a "bad coupler" had it been brought to his attention. Under these facts, this Court held that there was sufficient evidence to go to the jury upon the question of whether, in fact, the coupler was defective.

In deciding that case, we think it clear that this Court recognized the burden upon the plaintiff to prove the fact of a defective coupler mechanism, and certainly did not recognize any rule of law which would allow this essential fact to be presumed or inferred from the mere fact that the employee went between the ends of the cars and was injured.

In St. Louis etc. R. R. v. Conarty, 238 U. S. 243, this Court held that the Act was not intended to provide a safe place between colliding cars. It held that where the deceased was riding on a colliding engine, not endeavoring to couple a car or to handle it in any way, and when his engine collided

with a defective car which had no coupler or drawbar, and he was killed by reason of the fact that if the missing coupler and drawbar had been in place they would have kept the engine and car far enough apart to prevent his injury, that fact did not bring the case within the statute. Thus, in that case, where there was clear proof that the coupler mechanism was entirely missing, this Court held the railroad was not liable, because the defective coupler was not the proximate cause of the accident, the collision by the engine being the proximate cause.

In San Antonio etc. Ry. Co. v. Wagner, 241 U. S. 476, 479, there was direct evidence that upon the first impact the coupling "wouldn't make," and further evidence that after the failure to effect the coupling on the first impact the coupler was out of adjustment so that the employee had to reach in with his foot to shift the drawhead over so the coupling could be made. In doing this he slipped, fell, and was crushed.

This Court, in that case, held that there was sufficient evidence to support a finding of a violation of section 2 of the Safety Appliance Act and held that such violation, being proved, constituted negligence per. se. But certainly this Court, in that case, did not go on the theory that there is no burden of proof on the plaintiff to prove the defective condition of the coupler or that such condition could be presumed or inferred from the fact that the employee went between the cars to manipulate the mechanism and was injured.

In Atlantic City R. R. Co. v. Parker, 242 U. S. 56, there was proof that the drawhead was so far out of line that it was necessary for the brakeman to reach in with his arm for the purpose of straightening it so as to make the coupling possible. There was proof that there was too much lateral play in the drawheads. On such proof this Court held that there was sufficient evidence to support a finding of violation of the Act. Clearly this Court considered that the burden was on the plaintiff to prove that the coupler was defective and in that case the plaintiff proved it.

Some of the language in Louisville & N. R. R. Co. v. Layton, 243 U. S. 617, seems inconsistent with some of the language in St. Louis & S. F. R. R. Co. v. Conarty, 238 U. S. 243. In the Layton Case, this Court held that the protection of the Act is not limited to employees engaged in coupling or uncoupling, and that where the proximate cause of an injury to an employee not engaged in coupling or uncoupling was a defective coupler in violation of the Act, the railroad was liable. The duty imposed by the Act was again treated as absolute. But again there was no suggestion that the burden was not on the plaintiff in such case to prove the fact of a defective coupler and that his injury proximately resulted from such injury.

In Lang v. New York Central R. R. Co., 255 U. S. 455, this Court reaffirmed the doctrine of St. Louis & S. F. R. R. Co. v. Conarty, 238 U. S. 243, distinguished the case of Louisville & N. R. Co. v. Layton, 243 U. S. 617, and also distinguished the case of Minneapolis & St. L. R. R. Co. v. Gotschall, 244 U. S. 66, which we shall discuss in a moment.

Whatever inconsistency there may be between the Court's language in the Conarty Case, supra, and its language in the Layton Case, supra, was resolved and clarified by this Court'in Davis v. Wolfe, 263 U.S. 239, 243, where, after discussing the Conarty Case, the Lang Case, the Layton Case and the Gotschall Case, this Court said:

"The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under/the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

And in Davis v. Wolfe, supra (p. 244), this Court specifically held that "there was substantial evidence tending to show that the defective condition of the grab iron required by section 4 of the Safety Appliance Act was a proximate cause of the accident resulting in injury to Wolfe while in the discharge of his duty as a conductor." Certainly no implication can be drawn from that case that the fact of safety appliance defect can be presumed or that the burden is not on

the plaintiff to prove it.

In Chicago G. W. R. R. Co. v. Schendel, 267 U. S. 287, there was clear proof of a defective coupler mechanism. There a drawbar pulled entirely out of a car in the train insemain line movement. The crew chained this car to the one ahead. The engine pulled the whole train into an adjacent siding, on a gentle grade, and stopped. The intention was to detach the damaged car and leave it there by cutting off the engine, bringing it around to the back of the train, cutting off the rear portion, leaving the crippled car, and then to couple the rear portion to the front portion of the train and move on. Schendel's intestate, Bing, acting under his conductor's directions, went between the cars to disengage the chain, serving as a substitute for the missing coupler, and while so engaged was caught by the chain and killed when the car ran down the grade.

There was no doubt in that case of the clear proof of a defective coupler and that the defect caused the injury.

This Court said (p. 292):

"He went into the dangerous place because the equipment of the car which it was necessary to detach did not meet the statutory requirements especially intended to protect men in his position."

Not only can no inference be drawn from that case that the harsh rule of absolute liability under the Safety Appliance Act can be imposed without proof of defective mechanism in violation of the Act, but this Court in that case reaffirmed the Conarty Case and Davis v. Wolfe, saying (p. 291):

"Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, must be understood as in entire harmony with the doctrine announced in St. Louis & S. F. R. R. Co. v. Conarty, and not as intended to modify or overrule anything which we there said."

In Minneapolis etc. Ry. Co. v. Goneau, 269 U. S. 406, a train had parted between two cars, due to a defective coupler, and the brakeman went between the ends of the cars and, while exerting himself to bring the defective part into place, lost his balance as a result of its sudden yielding, fell from a bridge on which the ear was stopped, and was injured. There the proof of the actual defect was clear. This Court, upon such proof, held that the defective car was "in use" though motionless; that the brakeman was engaged in a coupling, not in a repair; that the defective coupling was the proximate cause of his injury, hence the defense of assumption of risk was abolished by the Federal Employers' Liability Act; and that the provisions of section 4 of the Supplemental Safety Appliance Act of 1910, avoiding penalties in connection with a car becoming defective in transit, had no application to relieve the railroad of liability to the injured employee.

Specifically this Court held in that case that there was substantial evidence (which it reviewed in detail) tending to show that the coupler was defective (p. 408), and it further specifically held that "there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident resulting in the injury to Goneau while he was engaged in making a coupling in the discharge of his

duty, * * *" (pp. 410-411.)

There was no suggestion by this Court in that case that either of these two branches of proof (1) that the coupler was defective, or (2) that the defect was the proximate cause of the injury, could be dispensed with by indulging a presumption of non-negligence of the employee or by basing an inference of a defective coupling on such presumption.

Swinson v. Chicago, St. P., M. & O. Ry., 294 U. S. 529, applied the settled rule of liberal construction of the Safety Appliance Act so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act. It affirmed a recovery for an injury to a brakeman who was using a defective grab iron as a foot brace, instead of as a hand hold, but in that case there was sufficient evidence that the grab iron was not secure enough for its intended use as a hand hold, as well as evidence that its use as a foot brace was customary. There was no suggestion that a finding that the device was defective could be grounded on a presumption of the employee's non-negligence. All the implications are to the contrary.

Brady v. Terminal R. R. Assn., 303 U. S. 10, the latest expression by this Court under the Safety Appliance Act which we have found, was a case involving clear proof of a defective grab iron. The board to which it was attached was rotten from end to end on the under side and to some extent on the upper side around the bolts with which the grab iron was attached to the board. That case reaffirmed Swinson v. Chicago, St. P., M. & O. Ry. Co., 294 U. S. 529, and Davis v. Wolfe, 263 U. S. 239, and all of its implications are in harmony with those cases.

Where a statute imposes an "absolute liability" for use of a defective appliance, where negligence need not be proved and due care is no defense, it seems to us that courts ought to scrutinize evidence with care to see whether it can fairly be said that the plaintiff has met the burden of offering substantial proof of the very basic fact that there was a defective appliance in use in violation of the statute.

We think the proposition just stated is implicit in the unanimous holding by this Court in Southern Ry. Co. v. Lunsford, 297 U. S. 398, where, with particular consideration of the rule of absolute duty and of absolute liability for its violation under the Boiler Inspection Act, it was held that "it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experi-

mental purposes, should become part thereof within the rule of absolute liability." (P. 402.) This Court therefore held that the device known as the "watchman," not required by the rules of the Interstate Commerce Commission, not in general use but used by the one carrier experimentally, which could not add to danger but might or might not prevent a derailment which would have occurred but for its presence on the locomotive, was not a part of the locomotive within the meaning of the Act.

Petitioner in our case, however, relies strongly on Minneapolis & St. L. R. R. Co. v. Gotschall, 244 U. S. 66, and seeks to draw from that case a rule that there need be no proof that a coupler is defective, but that such fact can be implied

from the mere facts of an accident and an injury.

But the Gotschall Case dealt with a very special situation of a moving freight train parting because of an unexplained failure or opening of a coupler. The brakeman, walking over the top of the cars, fell and was killed when the train parted. The railroad was held liable. This Court in effect applied the doctrine res ipsa loquitur to that special situation, although it conceded, under authority of Patton v. Texas & P. Ry. Co., 179 U. S. 658, and Looney v. Metropolitan R. R. Co., 200 U. S. 480, that that doctrine, that negligence may be inferred from the mere happening of an accident, will not be applied "except under the most exceptional circumstances' (p. 67.)

The case of a moving train parting because a coupler uncouples certainly presents such exceptional circumstances. According to universal, ordinary experience, a proper automatic coupler, once coupled, stays coupled until human agency intervenes to uncouple it. The essential function of an automatic coupler is to couple and stay coupled until uncoupled. The circumstance of a coupler parting and breaking a moving train is so extraordinary, so contrary to experience, that res ipsa loquitur may well apply. Automatic couplers simply do not part in that way unless there is something wrong with them.

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But our case presents a very different situation. Our case deals with human conduct, not mere mechanical, functional failure. It cannot be said, according to any universal or ordinary experience, that brakemen do not ever go between cars to make couplings unless there is mechanical defect in the coupler. They do it every day, whether negligently, thoughtlessly, in haste, or because they think it easier than to operate the pin lifter. Anyone who has watched brakemen and switchmen working, and we all have, knows this. Proof that such a man goes between cars is wholly insufficient to prove that the mechanism is defective or that a failure of the pin lifter to operate properly has made his going between cars necessary.

In the Gotschall Case there was undoubted failure of the mechanism. That was just what was shown. In our case there is no proof of defect in or failure of the mechanism. There is only proof of human conduct of the deceased, Stewart, which he ought not to have engaged in, which he need not have engaged in, if a fair use by him of the pin lifter could have opened the coupler knuckle. But there is no proof that he tried to use the pin lifter at all, no proof that it failed to work, and the evidence of the only witness, petitioner's witness, the engineer, tends only to show that

Stewart did not try to use the pin lifter at all.

Under this state of proof, petitioner would have the court and jury base a finding of a defective coupler mechanism upon the indulgence of a pure presumption that Stewart would not have acted carelessly or negligently. Upon that presumption petitioner would build an inference that Stewart must have tried to open the coupler with the pin lifter, an inference that he must have given it a fair trial such as, under ordinary practice, was sufficient to open a 40 pound knuckle if not defective, an inference that upon such trial he could not open the knuckle, and an inference that the coupler was defective and that the defect was what caused Stewart (a human agent acting under his own volition) to go between the cars.

We think petitioner's theory clearly violates the holding by this Court in Looney v. Metropolitan Railroad Co., 200 U. S. 480, 487, 488, and is contrary to the holdings and to all the implications of the holdings in the decisions of this Court, above reviewed, dealing particularly with the Safety Appliance Acts.

We think petitioner misuses a presumption, the presumption of due care on the part of the deceased, which does exist where there is an issue of contributory negligence, as to which the burden is on defendant. The problem really goes to the question of the burden. See Wigmore on Evidence, 3rd Ed., Vol. 9, sec. 2507. On an issue of contributory negligence, the burden is on the defendant pleading that defense to overcome the presumption that the plaintiff was not negligent. All the cases relied on by petitioner as indulging a presumption of non-negligence of the injured party will be found to have dealt with such issue.

But on an issue as to the defendant's negligence (or violation of a statutory requirement whose violation amounts to negligence per se) the burden is on the plaintiff, and for the very reason that on such issue there is indulged a like presumption that the defendant was not negligent. On such issue, a finding that defendant was negligent (or violated a safety appliance statute) cannot be based on presuming that the plaintiff, or his decedent, would not have been negligent. Laoney v. Metropolitan Railroad Co., supra. To do that would be to wipe out entirely the burden on plaintiff, and to postulate, on the sole basis of presumption without proof, the very violation of the safety statute alleged by plaintiff as the sole negligence of defendant.

That is what this case comes down to.

It remains to examine briefly some of the decisions by lower federal courts under the Safety Appliance Act.

Petitioner relies upon Didinger v. Pennsylvania R. Co. (C. C. A. 6th), 39 F. (2d) 798, but that case is wholly distinguishable from ours and for the very reason that there

it was proved * that the employee operated the device, set the hand brake, ratchet and dog, in the proper and usual manner, firmly engaged and set them, and that thereafter the brake suddenly "gave away". There the very thing was proved which was not proved in our case, that the employee operated the mechanism in the proper and customary way and that thereafter there was a mechanical failure, from which a defect could have been inferred.

As to how a safety appliance defect can'be proved, the

court said (p. 799):

"There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner."

In our case neither recognized method of proof was followed. There was no proof of a particular defect. And there was no proof that Stewart operated the device with due care, in the normal, natural, and usual manner and that it failed to function. In lieu of such proof, petitioner would have the Court presume that Stewart would not have done a negligent act and therefore to presume that he tried the pin lifter with due care, in the normal, natural, and usual manner, and that it would not work.

Vigor v. Chesapeake & O. Ry. Co. (C. C. A. 7th), 101 F. (2d) 865, was just like Minneapolis & St. L. R. R. Co. v. Gotschall, 244 U. S. 66, supra, a case of an unexplained parting of couplers in a train, without human intervention.

In Terminal R. R. Ass'n. of St. Louis v. Kimbrel (C. C. A. 8th), 105 F. (2d) 262, plaintiff contended and proved that when he came up to the ends of the cars he found that the knuckles of both couplers were closed and that it would be

That is, offered to prove by opening statement. Verdict against plaintiff was directed upon plaintiff's opening statement. The Court of Appeals reversed, treating the opening statement, of course, as proof.

necessary to open one of them in order to effect a coupling; that after some slack had been made he tried to open the knuckle by means of the pin lifter without going between the cars but that "the pin lifter would not budge" and so he went between the cars to open the knuckles by hand. As he did so the cars were pushed together without warning and his arm was caught, injured, and had to be amputated. The very proof was in that case which is totally lacking in ours.

Affirming recovery by the plaintiff, the court approved, as correctly declaring the settled law, the following instructions by the trial court (p. 264):

"The Court charges the jury that no liability on the part of defendant arises from the mere happening of the accident. The mere fact that an accident happened is not proof that the coupler would not couple automatically by impact. There is no presumption in this case that the coupler would not couple automatically

by impact.

"The Court charges the jury that the mere fact that the plaintiff may have sustained an injury, if you so find, is not sufficient to warrant you in returning a verdict against the defendant in this case. You cannot presume that the couplers would not couple automatically by impact, but on the contrary the law places on plaintiff the burden of proving such fact, to your reasonable satisfaction, by the greater weight or preponderance of the credible evidence."

In our case there was total failure of any proof that Stewart made any effort to use the pin lifter. There was no proof that he gave it a fair trial, or endeavored to operate it in the ordinary, usual, and natural manner, and that it would not work. The only pertinent evidence, the testimony of the engineer, plaintiff's witness, who was watching Stewart all the time for signals, tends only to prove that Stewart made no effort to use the pin lifter.

Petitioner sought certiorari here upon a contention that the court below held that in order to recover on the ground of violation of the automatic coupler provision of the Safety Appliance Act for the death of an employee resulting from fatal injuries sustained by him while between two cars attempting to open the knuckle by hand, there must be testimony of an eyewitness to the casualty showing affirmatively that the deceased employee, before going between the cars to open the knuckle by hand, tried to open it by using the pin lifter at the side of the car. (Petition, pp. 10-11, Brief in Support of Petition, p. 16.)

That is a wholly inaccurate summary of the holding below. Here there was an eyewitness. He was plaintiff's witness. He was the only eyewitness. He was watching Stewart all the time for signals. He testified that the visibility was good and that he saw Stewart's signals but that he did not notice Stewart make any effort to use the pin

lifter before going between the cars.

Under that testimony of the eyewitness, the court below held that it could not be presumed that Stewart did try the pin lifter, or that he gave it a fair trial, and that it would not work. Under all the authorities the decision was, we submit, obviously right. Any other holding would, we submit, utterly abolish the plaintiff's burden of proof and would mean that in any case mere proof that the man went between cars to open the knuckle is sufficient to establish, by pure presumption, that the coupler was defective.

That would destroy the statutory test of the sufficiency of the coupler and would leave liability vel non of the railroad to depend wholly on the act of a voluntary human agent, whose actions the railroad cannot possibly control.

It is a Safety Appliance Act, not an act imposing absolute liability on the railroad for unsafe conduct of an em-

ployee.

But, petitioner asserts, there was sufficient evidence that the coupler was defective, in the testimony of Stogner, the other switchman, as to what he did after the accident, assuming, which petitioner's theory of the case so far does not assume, that the burden is on plaintiff to prove a defect and that it cannot be presumed. The court below dealt fully and correctly with that contention. (R. 442-444.) We quoted the pertinent part of the opinion in our Brief in Opposition to Certiorari (pp. 16-17). The treatment by the court below of Stogner's testimony and its holding regarding it seems so obviously right as to need little additional discussion here.

Stogner was the other switchman in the same crew. (R. 26.) The accident occurred about 5:40 p. m. on the 12th of February, 1937, a dry day. (R. 26, 27.) They had probably eighteen or twenty cars on the track, coupling them up. About seven or eight of the cars were attached to the engine and the engine was headed west. The track was straight. (R. 27, 28.)

Stogner at the moment was engaged in taking a check of the cars, that is, getting a list of where they were to go. He was about eighty or ninety feet east of Stewart. The engineer on the engine was west of Stewart and accordingly Stewart was between Stogner and the engineer. (R. 28.)

The switchmen were working on the engineer's side, which was the north side. (R. 29.) The last time Stogner saw Stewart before the accident was about three, or four, or five minutes before. Stogner did not see Stewart attempt to lift the pin lifter on either of the cars between which he was found. He did not know whether Stewart tried to lift the pin lifters or not. He was not watching Stewart. (R. 42, 43.)

Stogner testified that the first notice he received that Stewart had been injured was when he heard Stewart holler. Stogner then ran to him. He found him with his right arm caught between the couplers, both of which were closed. (R. 29.) He testified that it is impossible to couple cars with both knuckles closed; that they can be coupled with one knuckle open and one closed, or with both knuckles open; that you have to have at least one knuckle open in order to make an automatic coupling. (R. 31.) He described the coupler knuckles and the pin lifter mechanism which is for the purpose of opening the knuckles. He de-

scribed the method of opening the knuckle by the pin lifter, "you would walk up to the car and reach down and get the lever and jerk the lifter and it kicks open." (R. 31.) "If you do not open by pin lifter, you jerk it a time or two, you go and pull this apart, open that car, and by reaching in you put your body in between the cars." (R. 33.)

Stogner's testimony expressly shows that switchmen frequently, instead of relying entirely on the pin lifter on the side of the car to open the knuckle, do it by using both hands, one hand on the pin lifter and one on the knuckle. He testified that that method would give leverage, holding the weight of the knuckle off itself. (R. 34.) Thus his testimony without contradiction shows, what we have above stated, that switchmen frequently go between the cars to open a knuckle for their own convenience instead of relying on the pin lifter.

Then Stogner further testified (R. 34):

Q ow heavy are those things that swing out, pretty heavy?

A. Why yes, they weigh probably forty pounds, in

that neighborhood.

- Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident?
 - A. I did.

Q. How did you open the knuckle?

A. I opened it with my hand.

Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?

A. No, sir.

Q. Mr. Stogner, did Mr. Stewart have any other duty there at the time other than to couple these cars?

A. None that I know of.

The only other pertinent evidence of Stogner as to what he did when he coupled the cars after the accident is the following which occurred on cross-examination (R. 36):

Q. Now, which knuckle did you try to open, or which pin lifter did you try to use!

A. The one on the north side.

Q. On the north side?

A. Yes, sir.

Q. And which car was that?

A. Well, that was the east car on the opening.

Q. The east car!

A. Yes, sir.

Q. And the pin lifter on the other car was there also, was it? A. Yes, sir.

Q. And did you try to open the knuckle with the pin lifter on the other car?

A. No. sir.

On re-direct Stogner explained that there was only one pin lifter on the north side, that is that the pin lifter on each car as you face the end of the car is on the left side of the car. (R. 38-39.)

Giving every possible reasonable inference to this evidence by Stogner as to what he did when he coupled the cars after the accident, it utterly fails to establish any facts from which a reasonable inference can be drawn that either of these couplers or pin lifters was defective even after the accident which injured Stewart. Though the question on cross-examination as to which knuckle he tried to open or which pin lifter he tried to use was ambiguous, since Stogner testified in answer "the one on the north side," it is evident that he tried the pin lifter on the north side. But it is perfectly consistent with his testimony that he may have opened the coupler knuckle in the method he had previously described, that is by handling the pin lifter with one hand and reaching in to open the knuckle with the other hand. He testified that he opened the knuckle with his hand and that he tried to use the pin lifter on the north side. He did not testify that the pin lifter would not open the knuckle. He did not testify that he jerked the pin lifter, as he had previously testified it was necessary to do in order to open the knuckle. He did not testify

what kind of a trial he gave it or whether he applied sufficient force to open the 40 pound knuckle. He did not testify that he had to go between the cars and open the knuckle by hand because he could not open it by use of the pin lifter. He gave no testimony from which it can be inferred, in the language of the Sixth Circuit Court of Appeals in Didinger v. Pennsylvania R. Co., 39 F. (2d) 798, 799, that he attempted to operate the pin lifter with due care, in the normal, natural

and usual manner and that it failed to function.

The only way petitioner can assert that Stogner's testimony has any tendency to prove that the coupler mechanism was defective or out of adjustment, even after the accident, is by indulging as to him the very same presumption of non-negligence which petitioner insists should be indulged as to Stewart. Petitioner asks the Court to indulge the presumption that Stogner would not have gone between the cars or reached between them to open the knuckle by hand unless he had first made a fair, normal and reasonable effort to open the knuckle by use of the pin lifter on the north side. Petitioner therefore asks the court to presume, in the absence of any proof, that Stogner gave a fair trial and was unable to open the knuckle by use of the pin lifter and therefore was obliged to go between the cars to open the knuckle by hand. From such presumption, and from it alone, petitioner would draw the inference that the coupler mechanism was defective.

The court below, after quoting the question and answer testimony of Stogner, very fully considered all the reasonable effect of Stogner's testimony, including his answer on cross-examination that he tried the pin lifter on the north

side. It said (R. 442-444):

"There was no evidence of mechanical defect or insufficiency in the couplers, including the pin lifter. There was no evidence of an unsuccessful attempt to couple them by impact when prepared for coupling. The testimony of the foreman that he opened the knuckle with his hand does not indicate that there was a defect in the coupling device. His testimony that it

is not necessary to go in between the cars to open the coupler with one's hands, if the coupler or pin lifter is working automatically, adds nothing to the proof as to the condition of the couplers on these cars. It certainly does not prove that the coupler of pin lifter on this particular car did not operate satisfactorily. On cross-examination the witness was asked which knuckle he tried to open or which pin lifter he tried to use, and he answered, 'The one on the north side.' But he does not testify that he was unable to open the knuckle by use of the pin lifter, nor what, if any, effort he made so to do. It must be remembered that this incident occurred after the accident and after deceased's arm had been crushed in the coupler. What effort he made to open the knuckle by use of the pin lifter, or what force he applied, finds no answer in this record but is left to conjecture. Did he make 'an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner,' and did he make application of enough force to open the knuckle if the coupler was in proper condition'? It does not even appear whether this 'try' to open the knuckle came after the knuckle was opened or before. A very essential element is left to conjecture and speculation. " • • where proven facts give equal support to each of two inconsistent inferences; • • neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other . Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333; Wheelock v. Freiwald, 8 Cir., 66 F. 2d 694. Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict can not be permitted to stand which rests wholly upon conjecture. or surmise, but must be sustained by substantial evidence. Midland Valley R. Co. v. Fulgham, 8 Cir., 181

"There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the defendant's motion for judgment in its favor nothwithstanding the verdict."

It is to be remembered that Stogner was an eye-witness as to what he did. He had full knowledge as to what he did. This is no situation in which the defendant employer had knowledge peculiar to it and not available to the plaintiff. Stogner was the foreman of the switching crew. He was the plaintiff's witness and whatever knowledge the defendant railroad had was through the knowledge the plaintiff's witness Stogner had. He knew whether he made a sufficient trial of the pin lifter to open a knuckle in proper working condition. He did not testify that he did. He knew whether he was unable to open the knuckle by use of the pin lifter. He did not testify that he was unable to do so and counsel for the plaintiff did not ask him the question. He knew whether the apparatus at the particular time was in proper working condition and his knowledge of that fact was all-inclusive of any knowledge the defendant could have had of that fact. He did not testify that the mechanism was not in proper working condition and plaintiff's counsel did not ask him that question. The burden of proof here was still on the plaintiff and the plaintiff failed entirely to make the proof necessary as the basis of any inference that there was any defect in the mechanism or in its adjustment.

And moreover, as the court below aptly pointed out, Stogner did not even testify that his trial of the pin lifter on the north side came after he had opened the knuckle by hand or before. This very essential element is left to conjecture and speculation.

Again, as the court below aptly pointed out, all of Stogner's testimony as to what he did in connection with the mechanism related to a time subsequent to the accident which crushed Stewart's arm. Stewart's arm had been

crushed by a violent movement of the cars from the other end of the string, that is the end away from the engine, these cars being shunted west, that is toward the engine and the cars attached to the engine, from the east, by some force as to which the record is silent, and no cause of action was predicated upon that force or movement of the cars. (R. 441.) The violent impact from this movement, not caused by the engine, had brought the closed knuckles together with such force as to crush and practically amputate Stewart's forearm. There is nothing in the evidence to negative the reasonable supposition that this collision impact itself may have thrown the coupler mechanism out of adjustment. Since the plaintiff relied on a condition subsequent to the time at which Stewart was injured, the burden of proof was on the plaintiff to establish the basis of a reasonable inference that the condition of the mechanism at the time of Stewart's injury was the same as the subsequent condition upon which plaintiff relies. Not a word in the evidence furnishes the basis for such an inference. Accordingly, even if the presumption of nonnegligence on the part of Stogner could be indulged as a basis for a finding that he gave a fair trial to the pin lifter and could not open the knuckle by its use, in spite of the fact that he did not testify to such fact, still no reasonable basis is laid by the evidence for an inference that the mechanism was in the same condition at the time of the injury to Stewart. See Weekly v. Baltimore & O. R. Co., 4 F. (2d) 312, in which the Sixth Circuit Court of Appeals doubted whether a failure of a pin lifter completely to open a knuckle at a time subsequent to an accident in which that knuckle was involved, constituted any substantial basis for an inference that the mechanism was defective at the time of the accident.

Accordingly, we submit that the testimony of Stogner, given every reasonable inference in favor of petitioner, is wholly insufficient as a basis for an inference that the coupler mechanism was defective, not only when he operated it subsequent to the accident, but certainly at the time of

the accident to Stewart. Stogner's testimony does not help plaintiff at all except by the use of the same vice of inferring a safety appliance defect from a presumption of non-negligence of the employee (Stogner), which is used by petitioner in connection with the conduct of the deceased Stewart.

We submit, therefore, that the court below was right in holding that there was no substantial evidence to sustain the verdict, and in reversing the judgment of the district court with directions to grant defendant's motion for judgment in its favor notwithstanding the verdict.

Point Two.

In case this Court decides to review that now undecided question, there was reversible error in the trial court's charge, as held by the court below in its first, now vacated, opinion and judgment.

Assignment III (R. 356-357.)

Petitioner has asked this Court to review the entire record, consider all of respondent's assignments of error on the appeal below, to hold that all such assignments are without merit, and not only to reverse the last judgment of the court of appeals below but also to affirm the judgment of the district court in favor of petitioner. This makes it necessary for us to deal with some of the assignments not passed upon by the court below in this last judgment.

In its first opinion (R. 402, at 411) the court below sustained respondent's Assignment III, which assignment was

as follows (R. 356-357):

"The United States District Court erred in charging the jury, over the objection and exception of defendant, as follows:

'You are instructed that it was the duty of the deceased in the performance of his work, before going between the (fol. 540) cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, ex-

tending on the outside of the car, and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars, if you find he did go between the ends of the cars.'

"On the grounds that said charge is an incorrect statement of the law, for two reasons.

"1st. Because it puts the burden of proof on the defendant initially to show that no effort was made.

"2nd. Because it is a legal presumption which is wholly unwarranted by the law, and that such operation of the court's charge conflicts with the other portions of the charge in which the jury is told that the burden of proof that is necessary to warrant a recovery by plaintiff rests upon plaintiff throughout the trial; that the fact that the coupler would not work is presumed and it is in conflict with that portion of the court's charge."

What the court below said, in sustaining this assignment, and what it quoted from this Court, is entirely self-demonstrative of the soundness of the holding. It said (R. 411):

"4. The charge of the court to which an express specification of objection is preserved is, as has been said, erroneous for the reason that it is inconsistent with the burden of proof imposed by law upon a plaintiff. The Supreme Court has settled this question, as we think, finally and conclusively.

'In an action for damages for personal injuries while the defendant has the burden of proof of contributory negligence, the plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff. There is equally a presumption that the defendant performed his duty.

'A plaintiff in the first instance must show negligence on the part of the defendant. The negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another.'

"Looney v. Metropolitan Railroad Co., 200.U. S. 480, 487, 488."

This Court will search through the entire charge of the trial court (R. 333-345) in vain to find that any other part of the charge cured the obvious error in the instruction covered by this assignment. Anything in other parts of the charge inconsistent with the error in the instruction covered by Assignment III would simply present the equally reversible vice of conflicting and inconsistent instructions.

Whatever this Court holds on the question on which certiorari was granted, we submit that the judgment of the district court should be reversed and at least remanded for new trial for this error in the charge. This, of course, unless this Court decides to remand to the Circuit Court of Appeals for its final decision upon the other Assignments of Error.

Point Three.

The administratrix not only made settlement and released her claim under express authorization of the probate court of Illinois which appointed her, but also, when she chose to repudiate the settlement and release, elected the remedy of a direct attack thereon for alleged fraud and duress in the said probate court. That court decided against her on the issues of fraud and duress. Its judgment is res judicata and could not be attacked in the liability action in the district court below.

Assignment XVI (R. 363-365.)

Assignment XXII (R. 368-377.)

Assignment XXVIII (III, XI, No. 4) (R. 393-396.)

In support of its defense of settlement and release, respondent offered in evidence the record of all the proceedings in the Probate Court of St. Clair County, Illinois, the court which appointed the plaintiff administratrix. The district court excluded these proceedings as irrelevant (R. 95) over respondent's exception and contention that the judgment of the said probate court was res judicata, binding upon plaintiff administratrix, could not be collaterally attacked and must be given full faith and credit by the district court.

Plaintiff sought and obtained an order of the Probate Court of St. Clair County, Illinois—the court which appointed her administratrix—approving the settlement she now seeks to impeach by collateral attack in this suit. That order authorized plaintiff administratrix to make the settlement and to give a full and complete release to respondent. (R. 96-98, 107-108.)

Thereafter, in the same court, plaintiff filed a petition charging that the settlement and release were procured by fraud and coercion of respondent's agents and attorneys, and praying an order setting aside the court's prior order authorizing the settlement. (R. 99.) Here, therefore, by

a direct attack on the settlement and release, plaintiff sought to and did litigate the very issues of fraud and duress which she relied upon later in the liability action below to vitiate the settlement and release. After hearing, the Probate Court denied the petition to set aside the order authorizing the settlement, thereby directly adjudicating against her the issues she sought to relitigate below. (R. 103.) It seems plain that this latter order of the Probate Court is res judicata of the issue of fraud and duress and cannot be collaterally attacked in this action.

In his reply to this point (supplemental brief, pp. 13-15) petitioner altogether ignores the second order of the Probate Court directly adjudicating the issue of fraud and duress, and insists he can here collaterally attack the earlier order approving the settlement because that order "was nugatory" since "it gave the administratrix no power she did not already possess." In support of this contention petitioner relies on the well-settled rule that an administrator, in an action of this character, "may compromise the claim without applying to the Probate Court or any other court for authority so to do" (ibid., pp. 14-15). Washington v. Louisville & Nashville R. Co., 136 Ill, 49, 26 N. E. 653; Ringel v. Pearson, 306 Ill. App. 285, 28 N. E. (2d) 576. But this is far from establishing that the Probate Court was without jurisdiction to make orders with reference to settlements by administrators appointed by it, as plaintiff must do in order to sustain its collateral attack here on the orders of that court.

Article 6, § 20, of the Illinois Constitution provides that probate courts "shall have original jurisdiction of all probate matters." To the same effect is Chapter 37, § 303, Illinois Revised Statutes, 1941. In Re Bishop's Estate, 370 Ill. 173, 18 N. E. (2d) 218, the Supreme Court of Illinois said:

[&]quot;In Dibble v. Winter, 247 Ill. 243, 93 N. E. 145, we said that in common usage the word 'probate' is often used as applying to any of the incidents of administration."

Certainly the settlement of a claim by an administratrix appointed by the Probate Court is "an incident of administration" as to which the Probate Court has jurisdiction. We do not see how it can be seriously controverted that it was within the jurisdiction of the Probate Court to make inquiry into whether a settlement and release made by an administratrix appointed by that court and subject to its supervision, and approved and authorized by that court, was procured by fraud and duress. And that inquiry was the very subject of the hearing resulting in the Probate Court's second order which plaintiff here seeks collaterally to attack. The fact that the present case was then pending in the federal district court in Missouri did not deprive the Illinois probate court of jurisdiction to pass, as it did, on the question of whether a release given by its administratrix was procured by duress. It had jurisdiction of the parties and of the subject-matter. Respondent was a party, by intervention, to that proceeding. (R. 103-105.)

In Chicago, R. I. & P. Ry. Co. v. Schendel, 270 U. S. 611, the administrator of the estate of an employee of an interstate railroad who had been killed in the course of his employment, instituted suit in a Minnesota court under the Federal Employers' Liability Act, to recover damages for the death. Thereafter, the employer filed a proceeding under the Iowa Workmen's Compensation Act, for a determination of its liability under that act. The widow, as sole beneficiary, was made an involuntary party to that proceeding, her objection being that her decedent was engaged in interstate commerce at the time of the injury and that the case was therefore subject to the federal rather than to the state law. Compensation was awarded the widow, and she appealed to the state district court, which held that decedent was not engaged in interstate commerce at the time of his death, and affirmed the award. There was no further appeal in the state courts. Thereafter the administrator brought on for trial his Liability Act case pending in the Minnesota court. The employer there contended that the

judgment of the Iowa court was res judicata on the issue of the character of commerce in which decedent was engaged at the time of the injury. But the Minnesota courts held this plea bad and rendered judgment for the administrator. This court, however, held that the judgment in the Iowa case was res judicata and that the issue there determined could not be relitigated in the Liability Act case. This Court said (p. 616):

"The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same. That the Iowa court had jurisdiction to entertain the proceeding and decide the question under the state statute, cannot be doubted. Under the federal act, the Minnesota court had equal authority; but the Iowa judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as res judicata. Boatmen's Bank v. Fritzlen, 135 Fed. 650, 667; Merritt v. American Steel-Barge Co., 79 Fed. 228, 234; Williams v. Southern Pac. Co., 54 Cal. App. 571, 575. And see Insurance Co. v. Harris, 97 U. S. 331, 336, where the rule as stated was recognized.

"The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified. United States v. Moser, 266 U. S. 236, 241, and cases cited. And, putting aside for the moment the question in respect of identity of parties, the judgment upon the point was none the less conclusive as res judicata because it was rendered under the state compensation law, while the action in which it was pleaded arose under the federal liability law."

There the crucial issue was whether or not the decedent was engaged in interstate commerce at the time of his death. Against the will of the administrator and the beneficiary in the pending Federal Employers' Liability Act case, the railroad submitted this issue to the Iowa state court, and its judgment was held res judicata in the Liability Act case. Our case is stronger, because here it was the administratrix and beneficiary herself who submitted the issue of the validity of the release to the Illinois probate court, and who now seeks to relitigate the very issue which she herself submitted to determination by the Illinois court.

True it was not necessary for the administratrix to submit the validity of the settlement to the Probate Court, as she did. She could have refrained from doing so, and permitted that issue to be litigated in the Liability Act case pending in the federal court in Missouri. So likewise it was not necessary for the railroad in the Schendel Case to submit to the Iowa court the question of whether its liability was governed by state or federal law. It could have waited for that question to be determined in the Federal Employers' Liability Act case then pending in the Minnesota court. But the Iowa court having determined the issue, this Court held it could not be relitigated in the Liability Act case. The same result must follow here.

It cannot be doubted that the Illinois probate court had as complete jurisdiction to determine the validity of a release executed by its own administratrix, responsible to it for the proper performance of her trust, and executed under its own express authority, as the state court in the Schendel Case had to pass on the issue of the character of commerce decedent was engaged in when killed—an issue going to the very heart of the pending Liability Act case.

Plaintiff may not now relitigate the issue passed upon by the Probate Court of Illinois, an issue within its jurisdiction to determine. *United States* v. *Paisley*, 26 Fed. Supp. 237. We think the case of Chicago, R. I. & P. Ry. v. Schendel, supra, is conclusive on this point, that the judgment of the Illinois Probate Court, in a proceeding directly invoked by the voluntary petition of the administratrix was res judicata, was binding on the plaintiff administratrix in the liability action below, could not be there collaterally attacked and the same issue there relitigated, but had to be given full faith and credit. See also Lion Bonding Co. v. Karatz, 262 U. S. 77, 88-90.

It follows that the district court below was in error in excluding the record of the probate court proceedings, in allowing the same issue of fraud and duress to be relitigated, in authorizing the jury to disregard or avoid the release and to return verdict for additional recovery for plaintiff, in not rendering judgment non obstante veredicto in favor of respondent, and in rendering judgment for plaintiff.

It further follows that, whatever may be this Court's decision on the question upon which certiorari was granted, in any event the judgment of the court below, reversing the judgment of the district court and remanding with directions to enter judgment for respondent notwithstanding the verdict, should be here affirmed on the grounds presented in this point.

Point Four.

The verdict of the jury is so indefinite as to be a nullity and in any event the judgment should have been reversed and remanded for new trial at least, by reason of this error.

Assignment VII (R. 394.)

In charging the jury on the issue of damages, the trial court gave the following wholly ambiguous and misleading charge:

"You are further instructed that your award to plaintiff, if any, may not exceed the sum of \$65,000, the amount claimed by plaintiff, less the sum of \$5,000, the amount heretofore received by her." (R. 340.)

The court did not instruct the jury that, if they found a lesser than the maximum amount prayed as the damages to which plaintiff was entitled, they should also return verdict for such amount less the \$5,000 plaintiff had already received. The jury returned a general verdict, finding for plaintiff in the amount of \$17,500. (R. 20.) No one could tell from the verdict whether the jury intended that plaintiff should recover \$17,500 in addition to the \$5,000 she had already received, i.e., an unnamed total of \$22,500, or whether it intended that the \$5,000 be deducted from the amount of \$17,500 named in the verdict, that is, judgment for \$12,500 more than she had already received.

The court put upon the verdict the construction most favorable to plaintiff and entered judgment for recovery of \$17,500 in addition to the \$5,000 plaintiff had already received, which meant total recovery of \$22,500 instead of \$17,500. (R. 20-21.) It, however, stayed execution pending ruling on respondent's motion for judgment non obstante veredicted or, in the alternative, for new trial. (R. 21-22.)

Respondent moved for judgment non obstante veredicto, or, in the alternative, for new trial, on the ground, inter alia, that the verdict was so indefinite as to be a nullity by reason of this ambiguity. (R. 22-24.) The district court overruled the motion as to this, as well as to all other grounds. (R. 24.)

Read in the light of the court's charge on damages, nobody can tell from the verdict whether the jury meant plaintiff to have a total recovery of only \$17,500 or of \$22,500. The more reasonable view would be that the jury understood that whatever they awarded in damages should be subject to the deduction of the \$5,000 she had already received. Nothing in the verdict indicates an intention or understanding of the jury that plaintiff should recover a total of \$22,500, \$17,500 plus the \$5,000 she had already received. The court's charge had instructed that the jury award was to be "less the sum of \$5,000, the amount heretofore received by her." The difference in the interpretation of this wholly ambiguous verdict is a difference of \$5,000 in the recovery. In putting upon the situation the construction more favorable to plaintiff, by giving her \$5,000 more of respondent's money, we submit that the district court was not exercising legal judgment but was speculating or guessing at the expense of the respondent. That is not fair play or due process of law.

Where the instructions to the jury leave it open to them to find upon either of two propositions or alternatives, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon the one rather than upon the other. De Sollar v. Hanscome, 158 U. S. 216, 221.

Such is the situation here. In any event the judgment of the district court should be reversed with remand, at least,

for new trial, by reason of this clear error.

Point Five.

Numerous other assignments of error by respondent in the court below, but not passed upon by it, warrant reversal of the judgment of the district court and remand for new trial at least.

1. Errors in instructions refused.

Assignment VI (R. 359) presents, we submit, reversible error in the refusal by the trial court to give a proper, requested charge to scrutinize the testimony of an interested witness in the light of his interest. The court nowhere gave a comparable or equivalent charge.

Assignment VIII (R. 359-360) presents the same error.

2. Errors in admission of evidence.

Assignment XXIII (R. 378-383.)

Assignment XXV (R. 384-386.)

Practically all of the evidence bearing on the issue of duress was pure hearsay, not within any known exception to the hearsay rule, consisting of testimony by plaintiff and by her daughter as to what plaintiff's son-in-law, Hamm, who was not a witness, though available, told her regarding a crucial conversation between him and the attorney for the Terminal Railroad Association, Judge Howell, which conversation was the basis of the charge of duress.

Judge Howell, who had died before the trial, testified by deposition previously taken by plaintiff. His testimony (R. 145-154) completely refuted all the charges of duress, alleged to have been exerted by him on Hamm, and through Hamm, her son-in-law, on plaintiff. Plaintiff did not call her son-in-law, Hamm, to testify in contradiction to the testimony of Judge Howell. Instead the court, over objection and exception by respondent, allowed the plaintiff and Mrs. Hamm to recount at length their versions of what Hamm had told the plaintiff was said in the crucial conversation between Hamm and Judge Howell.

It was on this conversation and on this hearsay rebuttal of the Howell deposition that the court allowed the issue of duress to go to the jury. (R. 335-336.) There was no attempt to prove fraud and no claim of fraud except by alle-

gation in the complaint.

We submit that the admission of this hearsay on the crucial issue of duress in the inducement of a release, which plaintiff had sworn to the probate court in Illinois was a fair settlement and agreed to by her and which, on her sworn petition was approved by that court, was reversible error.

We shall comment further upon this evidence under the

next point.

Point Six.

Eliminating wholly incompetent evidence admitted over objection and exception, and the admission of which was assigned for error below, there was no sufficient evidence to sustain the verdict finding that the settlement and release by the administratrix was induced by duress and setting aside the release. The release was therefore a bar to the action and the judgment of the district court should be reversed with directions to enter judgment for respondent non obstante veredicto.

Assignment I No. 6) (R. 349, 352.)

Assignment II (No. 6) (R. 353, 355, 356.)

Assignment IV (B. 357-358.)

Assignment XXI (B. 367, 368.)

Assignment XXIII (R. 378, 383.)

Assignment XXV (R. 384-390.)

Assignment XXVIII, Grounds IV, XI (No. 6) (R. 393-396, 394, 396.)

Although the plaintiff charged both fraud and duress in avoidance of the release pleaded by respondent, there was no other contention of fraud and no proof of fraud. Petitioner in his briefs here does not claim fraud. The whole theory for avoidance of the release is based on duress.

There was a analysing that respondent's claim agent, Haun, was assidious in seeking to make a settlement with the administratrix, Mrs. Mary Stewart, that he saw her in various places at different times and constantly sought to make a settlement. The claim agent has the duty of settling cases with claimants if he can and he was performing his duty. No claim seems to be made that the conduct of the claim agent in and of itself, aside from the circumstances about to be referred to, constituted duress.

It is sufficient to refer to the statement contained in petitioner's Supplemental Statement, Brief and Argument (pp.

2-5) to see that the whole theory of duress in the inducement of the settlement is based on the fact that, at the instance of respondent's claim agent, Judge Howell, the General Attorney of the Terminal Railroad Association of St. Louis, in which association respondent is one of the proprietary lines, called to his office an employee of the Terminal Association, one Hamm, the son-in-law of the administratrix, Mrs. Stewart, and it is claimed that in the ensuing conversation in Judge Howell's office between Judge Howell and Hamm, the son-in-law of the administratrix, duress, in the form of a threat, covert, veiled, or implied, was applied to Hamm, in effect threatening him that if he did not influence his mother-in-law, the administratrix, to settle her claim with Southern Railway Company, Hamm might lose his job with the Terminal Railroad Association. The whole theory of duress is based on this supposed threat to Hamm, which was supposed to have been communicated by him to his mother-in-law, and which in turn was supposed to have overpowered her will and influenced her to make a settlement of her claim for \$5,000, which otherwise she would not have made.

It was solely on the basis of this supposed threat to Hamm that he might lose his job, that the district court submitted the issue of duress to the jury, and obviously it was solely on the basis of this supposed threat to Hamm that the jury made its finding of duress and disregarded the release. That this is so is conclusively shown by the charge of the court below on the issue as to duress, which was as follows (R. 335-336):

"The Court charges you that the only question for you to consider, so far as the release offered in evidence is concerned, is whether or not its execution was procured by fraud or duress. You are not, under the law, entitled to consider whether or not the amount paid was adequate for the death of the deceased, John R. Stewart.

"If you believe from the evidence that there was no fraud or duress in the execution of the release, and the settlement was consummated in good faith by the Southern Railway Company, then it is your duty to find the issues in favor of defendant, Southern Railway

Company.

"The Court charges the jury, in determining whether the (fol. 507) release in evidence was procured by fraud or duress, you must not consider any representations, if any, made by defendant's attorneys or claim agents, that she had no valid cause of action against defendant, and that she could recover nothing against the defendant on account of the fatal injury to John R. Stew-

art, deceased.

"If you find and believe from the evidence that defendant, through its agents and servants, in the effort to induce plaintiff to make the settlement mentioned in the evidence, committed acts and used language for the purpose of leading plaintiff to believe that unless she made the settlement her son-in-law would lose his employment with the Terminal Railroad Association, and that plaintiff did so believe, and because thereof, if you so find, was put in such a state of fear as to be unable to act of her own free will, and that while under such fear and while unable to act of her own free will, if you so find, she agreed to the settlement, and did the things mentioned in the evidence in connection therewith; and if you further find and believe from the evidence that plaintiff would not otherwise have made the settlement: and if you further find that after the settlement was made plaintiff promptly rescinded the contract of release, and tendered to defendant the amount paid under (fol. 508) such settlement, then, you are instructed that the contract of release and settlement was not binding upon this plaintiff and should be disregarded by you."

If the supposed threat to the son-in-law, Hamm, is eliminated from the case, then the entire basis of the charge of duress is gone and nothing is left upon which the finding could rest. So it remains to consider how the evidence of the threat to Hamm was submitted to the jury.

Hamm himself was available as a witness. He was in East St. Louis and the administratrix, Mrs. Stewart, was staying at his house at the time of the trial. Mrs. Stewart talked to him the night before her testimony was given in court. (R. 188.) Hamm was still working for the Terminal Railroad Association at the time of the trial and had not been discharged, although previously his mother-in-law, after having made settlement with respondent, had repudiated the settlement and had charged respondent with fraud and duress in inducing the settlement. (R. 259.)

If Hamm was threatened by Judge Howell in the crucial conversation between the two in Judge Howell's office, obviously it was an idle threat which never was carried out. However, the important consideration is that there was no competent proof of any such threat. Hamm was available and was not called to testify.

The plaintiff took the testimony of Judge Howell, as a deposition, by examination prior to the trial. (R. 145-154.) Judge Howell and Hamm alone knew what took place between them. Judge Howell's testimony is in the record. Hamm did not testify. The following is shown by Judge Howell's testimony.

He never knew that the administratrix had a claim against Southern Railway Company until Southern's claim agent, Mr. Haun, spoke to him about it. He did not know that a lawsuit was pending. The first he knew of a lawsuit was when Mr. Noell, the Missouri lawyer who represented Mrs. Stewart in her lawsuit, called him up and balled him out for interfering with Mr. Noell's business. (R. 149.)

Judge Howell called up the East side office and requested that they have Bill Hamm come into see him his first opportunity. (R. 147.) Hamm came into his office at about 11:30, on November 15. When he walked into the office Judge Howell said "How-do-you-do?" Hamm said, "What do you want with me?" Judge Howell said, "Sit down a minute, Hamm. I want to talk to you. I understand that your father-in-law, a switchman for the Southern, was killed over there, and the Southern is trying to effect an amicable settlement with your mother-in-law and they had about reached an agreement. They are offering to pay her five thousand dellars clear, and she is willing to take it,

but that you are standing in the way." Hamm replied, "Yes, I am, because I don't want that woman gypped out of what money she gets." Judge Howell said, "How about the five thousand dollars?" Hamm replied, "That is the reason; that is all right to settle for that, if she gets the five thousand dollars." (R. 149-150.)

It is obvious from all of the evidence that Mrs. Stewart was worried, not because she thought five thousand dollars was not an adequate amount for her to receive in settlement, but because she feared that her Missouri counsel would take part of the five thousand dollars as his counsel fees. What

Hamm wanted was a guaranty against that.

Judge Howell asked Hamm what it would take to convince him that Mrs. Stewart would get the entire five thousand dollars. Hamm said he would want it put in writing. Judge Howell said that the railroad would hardly put it in writing but asked Hamm if he would be satisfied if Bruce Campbell, Illinois counsel for Southern Railway Company, would tell him that his mother-in-law would get the five thousand dollars clear and that Southern would stand all other expenses. Hamm finally said that if Judge Howell told him that he would believe it, and then he said that if Mr. Campbell told him the same thing he would believe it (R. 150).

Then the following occurred (R. 150-151):

I said, 'Don't let us have any misunderstanding about this, Hamm.' I got this kind of quickly and I didn't understand (fol. 234) the situation. I turned around to my desk and called Bruce Campbell. I talked with Bruce Campbell and stated, in Mr. Hamm's presence, re-stated what I had already stated.

Mr. Campbell says, 'That is correct.' He said, 'Is

Hamm there?

I said, 'Hamm is right here now, listening, and Hamm says it is all right, that he thinks five thousand dollars is a reasonable settlement, if she gets that much money, and I have myself guaranteed him that she will get that, if you say so.'

He says, 'Why not have him come right up here'

I said, 'That would be fine.'

I said to Hamm, 'Hamm, can you go right up to Mr. Campbell's office?'

He said, 'Sure.'

I said, 'Hop on a car.'

'You stay, Campbell, until he get there.'

'Go on, Hamm, and whatever Bruce Campbell tells you I will guarantee,' and he went out of the office. He said good-bye, shook hands, and away he went. That

was the whole conversation.

At that time I was under the impression that it was an accident, and they were settling it up: I knew nothing more (fol. 235) about it, or heard nothing more about it until Mr. Noell called me up on the telephone and had a conversation about the suit. I said I didn't know there was a suit. I think the next morning I saw in the paper that there had been a suit filed.

Judge Howell had not seen Hamm since that conversation and did not even know Mrs. Stewart. There was not a thing said in the conversation between Judge Howell and Hamm, either directly or indirectly, that Hamm would be discharged or fired if the settlement was not made. Judge Howell knew what position Hamm occupied, that he was a good man, with a good record; and there was not a word said about his job, and nothing was said in any threatening manner. In fact, it would have been ridiculous, as Judge Howell testified, for him to have attempted to threaten Hamm about his job. Hamm would have laughed in his face and said, "You cannot take my job away, a man that has the seniority that I have. There has to be some good cause for it. That is the agreement with the Brotherhood, and sustained by the Labor Board." The job was not mentioned at all (R. 151-152).

Mr. Hamm was invited to Judge Howell's office and came there; although he was respectful in his attitude to Judge Howell, he was not at all afraid. He was not "called upon the carpet" (R. 153).

The foregoing is all of the competent evidence in the record as to what occurred between Judge Howell and Mr. Hamm in the crucial conversation between them upon which the whole theory of duress is grounded.

Now consider how the district court allowed that conversation to be submitted to the jury.

Without calling Hamm to testify, although he was perfectly available, the district court, over respondent's objection and exception on the ground that it was wholly incompetent hearsay, allowed Mrs. Stewart, Hamm's mother-in-law, to give the following testimony as to what Hamm had told her regarding his conversation with Judge Howell in the latter's office.

Mrs. Stewart learned from Hamm that he had had a talk with Judge Howell, that he had been called to Howell's office. Hamm told her that they had called him to the office to see Mr. Howell, Mr. Howell asked him about Mrs. Stewart's case, said he did not know there was a case of that kind, but said he had been notified to see if he could not urge Hamm to take the amount of money offered (R. 378).

Mrs. Stewart testified that Hamm had told her that when Mr. Howell suggested that he see Mr. Campbell it meant Hamm's job, so he had better go see Mr. Campbell. Mrs. Stewart testified that Hamm told her that it might mean his job and that she had better go see Mr. Campbell (R. 378-379).

Mrs. Stewart testified that Hamm had told her that the Terminal Association was not hiring men his age and he might lose his job. The district court even allowed her to testify as to the effect on her of what Hamm said to her. She testified that she knew Hamm had been working for the Terminal Association a long time, and if he would lose his job he might not get another and he had a family, a wife and two children, to keep. She testified that after Hamm told her about the conversation between him and Judge Howell she was very worried and thought that if Hamm lost his job his wife and children would suffer and that she told him so, that if Hamm lost his job he might not get another (R. 379).

Mrs. Stewart testified that after her conversations with Hamm and with counsel for respondent she was just to where she did not know what to do, and the more she studied she thought about those children that would suffer, and if Hamm lost his job she knew they would suffer, so she took

the money (R. 380).

We submit that it needs no citation of authority to demonstrate that the foregoing testimony was wholly incompetent hearsay, not within any known exception to the hearsay evidence rule, and that its admission not only constituted reversible error but constituted an admission of purely hearsay evidence to establish the whole basis upon which the theory of duress was submitted to the jury. Without that hearsay there is no evidence of any suggestion of threat or duress applied to Hamm and through Hamm applied to Mrs. Stewart. See Wigmore on Evidence, 3rd Ed. vol. VI, secs. 1751-1791.

And further, the district court allowed testimony which was hearsay to the second degree to be given by Mrs. Hamm, the daughter of Mrs. Stewart, all admitted over exception and objection by respondent (R. 384-390), in which she related what she had heard her husband tell her mother as to what was said in the conversation between him and

Judge Howell.

The district court allowed Mrs. Hamm to give the follow-

ing testimony:

Mrs. Hamm heard the conversation between her husband and Mrs. Stewart about the conversation he had had with Mr. Howell in the latter's office. She said that Hamm told her mother that he had been called over to the legal department, and that it is not ordinarily done; that it was out of the ordinary, and that he knew it had a meaning behind it. She said that Hamm told her mother that Judge Howell told him that it would be a very good thing if the case was settled; and that Hamm said that he knew there was only one thing it could mean, and that was business. She testified that Hamm told her mother that it could only mean business, that they do not fool around inviting fellows over from work like that to have conversation with them and that they did not have to make a threat, their being interested in it was enough (R. 385).

The district court, over objection and exception, further allowed Mrs. Hamm to testify that she heard Hamm tell her mother that Judge Howell had told him that he would like for Mrs. Stewart to settle this matter; that Hamm had further told Mrs. Stewart that it would be a very good thing to do, because Hamm's being called into Judge Howell's office made it seem that his company's interest (the Terminal Association) was aroused towards this thing, and it would be the best thing concerning Hamm's position to have Mrs. Stewart go down and settle the thing; that Hamm and Mrs. Hamm both thought that the only thing to do was for Mrs. Stewart to settle her case (R. 387).

The district court allowed Mrs. Hamm to testify, again over objection and exception, that her husband and she and her mother-in-law had discussed the possibility of his losing his job and that that had been the main theory for

settling the case (R. 389).

We submit that it was flagrant error for the district court to admit the wholly incompetent hearsay evidence of Mrs. Stewart and of Mrs. Hamm as to what Hamm had told them about the crucial conversation between Hamm and Judge Howell upon which the whole theory of duress was submitted to the jury. All of this testimony was admitted over objection and exception by respondent and was covered in many ways by the assignments of error referred to above.

Eliminating this wholly incompetent evidence, there is not a scintilla of evidence that any duress was applied to Mrs. Stewart, not a scintilla of evidence to justify the jury in finding duress and in avoiding for duress the release as a complete bar to the action.

In any event, therefore, we submit that, whatever this Court may hold on the Safety Appliance Act question upon which certiorari was granted, still the district court should have granted the respondent's motion for judgment non obstante veredicto on the ground that there was no sufficient evidence of duress to avoid the release.

It follows that in any event the judgment of the Circuit Court of Appeals below should be affirmed, unless this Court prefers to remand the case to the Circuit Court of Appeals below for final consideration of this question of duress and of the other questions hereinbefore discussed which the Circuit Court of Appeals has not finally passed upon.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 161

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased, Petitioner,

Southern Railway Company, a Corporation, Respondent.

On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION BY RESPONDENT FOR REHEARING.

WILDER LUCAS,
ARNOT L. SHEPPARD,
WALTER N. DAVIS,
H. O'B. COOPER,
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Attorneys for respondent, defendant.

S. R. PRINCE, Of Counsel.



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On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION BY RESPONDENT FOR REHEARING.

To the Honorable, the Supreme Court of the United States:

Comes now Southern Railway Company, respondent in the above entitled cause, and presents this its petition for a rehearing of the said cause and, in support thereof, respectfully shows:

The Circuit Court of Appeals, in the judgment under review (119 F. (2d) 85, R. 436-444) held, as stated by this Court in its opinion (p. 2) that "there was no substantial evidence to sustain the verdict and reversed and remanded with directions to enter a judgment for the respondent."

The court below stated the legal basis of its holding by making a quotation from this Court's opinion in Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, (R. 443) as follows:

where proven facts give equal support to each of two inconsistent inferences; neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other ""

This Court granted certiorari on a petition asserting that the holding below was erroneous and was a decision of an important question of federal law which had not been, but ought to be, decided and settled by this Court. (Petition, p. 11.)

With great respect we submit that this Court, in its opinion and judgment rendered February 16, 1942, has not decided the question upon which certiorari was granted or, if it has decided it, has left its decision so ambiguous as to constitute an unfortunate precedent, unsettling rather than settling the law, and necessarily leaving the courts below and other courts in confusion as to what the controlling law is.

The effect of the decision below was that the plaintiff in the case had not introduced sufficient evidence in support of her only allegation of negligence (defective coupler mechanism) to sustain the burden of proof which the law casts upon her. If that decision was right, then, under the law as it has always heretofore been understood, judgment must go against plaintiff (petitioner) and in favor of defendant (respondent). See Pennsylvania R. Co. v. Chamberlain, supra.

As we read its opinion, this Court does not hold that that holding was either wrong or right. This Court does not discuss the burden of proof. It does not decide that the plaintiff's proof was sufficient to sustain the burden, if the burden is by law on plaintiff. In fact it holds to the contrary. It does not decide that the burden was not on plaintiff but was on defendant.

In terms, all that this Court has held is (p. 3):

"We hold that, on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

This necessarily means that on the evidence adduced, on a completed and closed record, the plaintiff had not met the burden of proof and was not entitled to "prevail," was not entitled to judgment. But it further necessarily means, and with great deference we submit inconsistently means, that in such situation the defendant also is not entitled to "prevail," is not entitled to judgment.

We have never before seen a decision to like effect in any reported case by any court. Does it not necessarily result in judicial paralysis? Is it not of the essence of the judicial process that when all the evidence is in, when each party has rested and a record is closed, the court must decide which party is to prevail, which is entitled to judgment?

The view of the dissenters in this case seems clear. The view set forth in the dissenting opinion is that, assuming the burden of proof to have been on the plaintiff, there was sufficient evidence to meet the burden and to sustain the verdict and judgment for plaintiff. The citation by the dissenting opinion of Ridge v. R. R., 167 N. C. 510, 521, Kirby v. Tallmadge, 160 U. S. 379, 383, and Interstate Circuit v. United States, 306 U. S. 208, 225-226, together with its comments on the failure of the defendant to call witnesses to negative the alleged defective condition of the mechanism, seems to evidence an a fortiori view of the dissenters that the burden was not on plaintiff to sustain by proof her allegation of defective mechanism but that the burden was on defendant to negative the allegation,

But it seems obvious that the majority of the Court did not agree with either the primary, or the a fortion, view Disagreeing with the dissent, the majority expressly held that the plaintiff is not entitled, on this record, to prevail. That being so, we respectfully submit that defendant is entitled to prevail, is entitled to judgment non obstante, and that the decision by the Court of Appeals was right and should have been affirmed. We believe it to be axiomatic and fundamental that upon a completed trial of a law action, where each party has offered all his evidence and rested, either the one party or the other is entitled as matter of law to prevail, to have judgment. Otherwise the judicial process has failed in its essential function, the function of jurisdiction, which Mr. Justice Holmes, in The Fair v. Kohler Die & S. Co., 228 U. S. 22, 25, defined as "authority to decide the case either way."

We submit that in its decision herein, on the question before it, this Court has in effect, and by inadvertence, failed to exercise jurisdiction in that it has decided neither way, has held "that, on this record, neither party is entitled to

prevail."

We understand, of course, that in its order in the final paragraph of its opinion, this Court has reversed the judgment below (which was in favor of respondent) and has remanded the cause to the Circuit Court of Appeals for further proceedings. It expressed no opinion on other errors assigned in the Circuit Court of Appeals which may affect disposition of the cause by that court, thus leaving it open to that court to decide such undecided issues. Conceivably on such further proceedings the Circuit Court of Appeals may hold that petitioner's attack on the release was an incompetent collateral attack on the judgment of the probate court of Illinois denying the charge of fraud or duress, that such judgment is res judicata, and hence that the release is a complete defense to the action. If so, judgment must go for respondent notwithstanding the verdict, and regardless of the question of the condition of the coupler. The same result would follow if the Circuit Court

of Appeals should hold against respondent on the issue of res judicata and collateral attack but should hold that the evidence was insufficient to support a finding of fraud or duress in the inducement of the settlement and release.

It is only if the Circuit Court of Appeals should hold against respondent on both those additional issues that the decision by this Court on the safety appliance defect question could come into play. That is the event which we understand this Court to have had in mind when it said, "If the issue as to the condition of the coupler mechanism was determinative * * ... In that event; as we understand this Court's decision, the Circuit Court of Appeals cannot affirm the district court's judgment in favor of plaintiff and it cannot do what it did before, reverse and remand with instructions to enter judgment non obstante in Savor of defendant, action which this Court has reversed. It can follow neither of those courses, because this Court has held that, on this record, neither party is entitled to prevail, and that in the event the condition of the coupler is determinative a new trial should be ordered "so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

Thus it seems reasonably clear what the function of the Circuit Court of Appeals would be if it should decide those other, undecided issues against respondent, but we respectfully ask this Court to look somewhat further with us and visualize the quandary in which this Court's present decision leaves the district court below and other trial courts

in like cases.

This Court's present decision, if it remains unmodified, is not only the law of this case, binding, in so far as it goes, on the courts below, but it also expresses the federal law as a precedent and theoretically the law as now declared is the law which existed when the district court below tried this case, as well as the law which is to control the district court if and when it enters upon a new trial.

But the district court, on the former trial, and after the jury verdict; was faced with only two possible alternatives, to enter judgment either for plaintiff or for defendant. It had only two motions before it. Plaintiff moved for judgment on the verdict. Defendant moved for judgment notwithstanding the verdict. The court had jurisdiction at that stage of one legal problem, which it had authority and duty "to decide either way": Was plaintiff entitled to judgment or was defendant entitled to judgment?

Plaintiff was relying on her jury verdict and on her evidence as sufficient to support it. She was not moving to set aside her own verdict and for a new trial to enable her to question the foreman or others more at length as to the condition of the coupler mechanism. She undoubtedly would vigorously have resisted such a suggestion. She was willing to risk the accuracy of her or of her counsel's judg-

ment as to the sufficiency of her evidence.

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Under this Court's decision it was the duty of the district court, at that stage, to make a hitherto unprecedented exercise of jurisdiction, to hold that neither party was entitled to prevail, to hold that neither party was entitled to judgment, and ex mero motu to set aside the verdict which plaintiff was not asking to have set aside and to grant plaintiff a new trial which she was not seeking, to the end that there might be a fuller examination of the foreman, because the court itself, not either of the parties, was, or under this Court's decision should have been, dissatisfied with the state of the record.

If the law puts the burden of this issue on the plaintiff, and we are assured by all the precedents that it does, then the effect and necessary result of this Court's decision is that where the plaintiff fails to sustain the burden of proof then the trial court cannot enter judgment for the defendant but must of its own motion avoid the proceedings and grant a new trial to give the plaintiff a new chance to make a case.

The situation is equally anomalous if it be assumed, as the dissenters imply but as this Court does not hold, that the burden is on the defendant to prove that the mechanism was not defective. If that be assumed, then the necessary result of this Court's decision is that where the defendant fails to sustain the burden resting upon it, leaving the record, as this Court holds the present record to be, unsatisfactory and insufficient to enable a proper determination of the issue of defect vel non, even in that event the trial court cannot give judgment for the plaintiff but must grant a new trial, on its own motion, to give the defendant a new chance to meet its burden.

With great deference, we submit that the present decision of this Court introduces a wholly new and a wholly unworkable concept into the substantive and the adjective law, which can but throw the law into uncertainty and confusion

and introduce insoluble problems into the practice.

We respectfully submit that the decision by this Court eliminates all legal effect of the burden of proof and necessarily means that decision in a tort action is not to be determined by the hitherto accepted test that the party upon whom the burden rests must sustain the burden or lose, but means that wherever a court feels that the party upon whom the burden rests has not met the burden and that there is no sufficient evidence upon which to determine the ultimate truth of a fact in issue, then the court must avoid the proceedings and grant a new trial, regardless of the views of the parties, so that the facts may be more fully explored.

This would violate the fundamental maxim that there should be an end of litigation. A party could always take two bites at the "cherry" of litigation. And no reason is seen why the principle should be limited to two bites. The bites might be successive and continuous so long as a court is unconvinced by the evidence of the ultimate truth of a fact in issue, regardless of where the burden of proof rests.

Even if the Court does not agree with the views which we above express, we submit that for another and entirely cogent reason this Court should grant rehearing and should affirm the judgment of the Circuit Court of Appeals. We submit, for the reasons and upon the authorities set out in our main brief to this Court under Point Three, pages 40 to 45, that there is an obvious and complete support of the judgment of the Circuit Court of Appeals in respondent's defense that the judgment of the probate court of Illinois, holding against the widow-administratrix on her charge of fraud and duress in the inducement of the settlement proceedings and release, is res judicata and could not be collaterally attacked by the plaintiff in the district court below. We submit this particularly on the authority of Chicago, R. I. & P. Ry. Co. v. Schendel, 270 U. S. 611, which we think is controlling on this issue.

That there should be an end of litigation is not only a general principle, but it is peculiarly applicable in this case. The deceased, who died over five years ago, left as his only dependent, and hence as the only beneficiary under the Federal Employers' Liability Act, his widow. His widow died pending the appeal to the Circuit Court of Appeals. No one remains interested in petitioner's cause of action except non-dependent next of kin and attorneys. The petitioner, in his brief to this Court, expressly asked this Court to review all of the assignments of error in the record before the Court of Appeals. We asked this Court, inter alia, under the doctrine that a respondent can rely in support of the judgment below on any ground which would support that judgment presented to but undecided by the Circuit Court of Appeals, to affirm the judgment of the court below on the ground of res judicata, collateral attack, and the bar of the release.

It would seem to us entirely futile for this case to be remanded to the Circuit Court of Appeals for further proceedings there, with the possibility of a remand to the district court for a new trial, of a further appeal to the Circuit Court of Appeals, and of a further attempt by certiorari to review the cause in this Court, and with the possibility of still further proceedings thereafter, when this Court has before it now an issue wholly determinative of this cause, with plain power, under the doctrine of Story Parchment

Co. v. Paterson Parament Paper Co., 282 U.S. 555, to render on this issue such judgment as the Circuit Court of Appeals should have rendered upon it had it passed upon it.

Therefore, in any event, we submit that this Court should affirm the judgment of the Circuit Court of Appeals on the ground of res judicata and collateral attack, which leaves the release given respondent by the deceased administrative binding and a complete defense to this cause of action.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit be, upon further consideration, affirmed.

Respectfully submitted,

WILDER LUCAS,
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WALTER N. DAVIS,
H. O'B. COOPER,
SIDNEY S. ALDERMAN,
Attorneys for respondent, defendant.

S. B. PRINCE, Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

SIDNEY S. ALDERMAN, Counsel for respondent, defendant.

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MAR 7 1942

CHARLES ELMORE CHOS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 161.

CLABENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased, Petitioner,

Southern Railway Company, a Corporation, Respondent.

MOTION BY PETITIONER AND RESPONDENT TO DISPOSE OF THIS CAUSE AS MOOT.

. WILDER LUCAS,
ARNOT L. SHEPPARD,
WALTER N. DAVIS,
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WILLIAM H. ALLEN,
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Attorneys for Petitioner.



IN THE

Supreme Court of the United States

OCCORDE THEM, 1941.

No. 161.

CLARENCE A. STEWART, Administrator of the Estate of John B. Stewart, Deceased, Petitioner,

Southern Railway Company, a Corporation, Respondent.

MOTION BY PETITIONER AND RESPONDENT TO DISPOSE OF THIS CAUSE AS MOOT.

To the Honorable, the Supreme Court of the United States:

Come now Southern Railway Company, respondent in the above entitled cause, and Clarence A. Stewart, Administrator of the Estate of John R. Stewart, deceased, petitioner, and present this their joint motion to dispose of the above entitled cause as moot.

This Honorable Court rendered judgment and opinion in the above entitled cause on February 16, 1942. Thereafter, on February 20, 1942, the respondent filed a petition for rehearing. Petitioner's time under the rules of this Court for filing similar petition or other motion has not yet expired.

Both petitioner and respondent now respectfully advise the Court that they have entered into a full compromise and settlement of this cause, petitioner has given respon-

dent a full release of his cause of action and both parties have agreed that this cause may be disposed of by this Court as most and that final judgment dismissing the cause as most may be entered either in the Circuit Court of Appeals or in the district court below, as the case may be.

Wherefore, petitioner and respondent jointly move this Honorable Court that it now make such disposition of this cause as to the Court may seem proper in view of the fact that the cause is now moot by reason of the compromise and settlement by the parties of all issues herein, respectfully suggesting that the course taken in *United States* v. Anchor Coal Co., 279 U. S. 812, would be the proper disposition.

Respectfully submitted,

WILDER LUCAS,
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OPINION

SUPREME COURT, OF THE UNITED STATES

No. 161 .- OCTOBER TERM, 1941.

Clarence, A. Stewart, Administrator, On Petition for Writ, of of the Estate of John R. Stewart, Deceased, Petitioner,

Southern Railway. Co.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 16, 1942.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This action was brought by the administratrix of Stewart's estate to recover for his death in consequence of a violation of the Safety Appliance Act. The crew of which the intestate was a member was engaged in coupling freight cars. Stewart was on the engineer's side of the train. He gave a back-up signal with which the engineer complied and then a stop signal which was obeyed. The engineer saw him go between the ends of the last car. of the train and the car that was to be coupled to it. While the train was stationary, this car drifted into collision with the end car of the train. Persons who responded to Stewart's cries found him with his arm crushed between the couplers, both of which were closed. His arm was amputated and a few days later he died.

The administratrix, pursuant to leave of a state probate court, executed a release in consideration of \$5,000 paid her. Subsequently she alleged in that court that she had been fraudulently induced to settle the case, and sought authority to rescind the release. The court decided against her after full hearing.

In the present action the plaintiff offered testimony as to the circumstances of the accident. The respondent relied upon the release; offered evidence to prove death was due to causes other than · the injury, but introduced no testimony as to what occurred at the time of Stewart's injury, or as to the condition of the couplers. The trial court ruled that the decision of the probate court on the issue. of fraud in procuring the release was not res judicata, and submitted to the jury all issues, including that of the validity of the release. A verdict was rendered for petitioner for \$17,500. It does not appear whether this sum was intended to be in addition to the \$5,000 theretofore received by the administratrix. The judgment entered was for the amount of the verdict without credit for that sum.

The respondent appealed to the Circuit Court of Appeals. The petitioner was substituted for the administratrix, who had died. Judgment non obstante veredicto was denied but the judgment was recorsed and the cause remanded for a new trial, for errors in the charge to the jury.² On motion of both parties a rehearing was accorded. The court then held there was no substantial evidence to sustain the verdict, and reversed and remanded with directions to enter a judgment for the respondent.³ This Court

granted certiorari.

The record contains no direct evidence as to any defect in the coupler mechanisms of the cars involved in the accident. Each was equipped with an automatic coupler having a "pin lifter", whereby the pin in the coupler can be lifted so as to allow the jaw of the coupler to swing into the open position. The purpose of the device is to permit a switchman to open the coupler into the position where it will engage with the coupler of the other car upon impact without the operator going between the ends of the cars. The engineer, a witness for petitioner, testified that he did not see the intestate attempt to use the pin lifter, but did see him, go between the cars. The foreman of the crew, also a witness for the petitioner, testified that when he arrived the jaws of both couplers were closed and decedent's arm had been crushed between them. He testified that after the accident he coupled the cars in question by going between the cars and opening the jaw of the coupler by hand. He stated that he tried to use the pin lifter on the car at the end of the train, which would be the one available on the side of the train on which he was working. He also testified that if the coupler was in working order it could be set by the use of the pin lifter. He was not asked, and did not state, what effort he made to operate the pin lifter. Neither party asked him any further questions as to the working condition of the pin lifter or coupler.

^{2 115} F. 2d 317.

^{8 119} F. 2d 85.

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The petitioner insists that, in the absence of evidence on behalf of the respondent, as to the condition of the coupler, the jury were entitled to infer that the pin lifter was not in working order, otherwise the foreman, an experienced man, would not have gone between the cars and opened the coupler jaw by hand. The court below held the jury was not entitled to draw this inference in the absence of testimony by the foreman with respect to his efforts to use the pin lifter and as to its condition.

We hold that, on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on

the subject.

The judgment must be reversed and the cause remanded to the court below for further proceedings. We express no opinion on other errors assigned in the Circuit Court of Appeals which may affect the disposition of the cause by that court.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Mr. Justice BLACK, dissenting.

The jury found from the evidence before it that the railroad had, contrary to the Federal Safety Appliance Act, used cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 45 U. S. C. § 2. The trial judge, who alone of the judges in the several proceedings below had the opportunity to see and hear the witnesses as well as to observe a coupling apparatus brought into the court room as an exhibit, made it clear that he regarded the evidence as sufficient to support

the jury's verdict both by submitting the issues to it and by denying a new trial. The Circuit Court of Appeals took the same position in its first opinion. 115 F. 2d 317. Solicitude for the right to trial by jury on issues of fact prompted the adoption of the Seventh Amendment as part of the Bill of Rights.1 Respect for the institution of trial by jury should, in my judgment, prompt us to leave undisturbed the jury's finding in this case that the coupler was defective.

Because it must rely on the written page rather than living words, an appellate court can never fully appreciate the effect of testimony heard by a jury of local citizens. Even in the written record, however, I can find support for the jury's finding which convinces me that it should stand. The transcript shows the fol-

lowing:

If a pin lifter functions properly, there will be automatic coupling of the cars, making it unnecessary for a workman to go between them. Stewart was an experienced workman. Besides being his duty, it was conducive to his safety for him to use the pin lifter to bring about coupling. On the day he was found with his arm crushed between the couplers, he had successfully handled the coupling of other cars.

The crew foreman who shortly after the accident undertook the coupling of the particular cars between which Stewart was crushed

testified as follows:

"Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident?

'A. I did. .

"Q. How did you open the knuckle?

"A. I opened it with my hand.
"Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?

"A. No. sir."

'And in the course of cross examination by the company's attorney whose questions indicated he accepted the fact that Stogner had tried without success to use the pin lifter, Stogner was saked: "Now, which knuckle did you try to open, or which pin lifter did you try to use?" His reply-"The one on the north side"-desig-

Amendment VII: "In Sults at common law, where the value, in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

nated the one connected with the coupler which had caused Stewart's death.

Had Stogner's attempts with the pin lifter been successful, he would not have had to go between the cars to couple them. But that was what he testified he did after trying to raise the pin lifter. True. Stogner did not say how many attempts he made, nor how much force he applied in the effort. But the jury could reasonably have inferred that the company's foreman, a worker of many years of experience, applied such force as would have raised a pin lifter which was not defective. Moreover, since there was a statutory duty not to continue using this particular pin lifter if it was defective, we can reasonably assume that the railroad's inspectors made some examination of it. Yet no inspector nor anyone else was called by the railroad to give testimony on the condition of the pin lifter immediately after the accident.3 Under these circumstances, reasonable jurors are not to be denied the right to make inferences which other reasonable people would make: that Stogner tried in the usual way to couple the cars; that his efforts were unsuccessful; and that he was therefore compelled to go between the cars to effect a coupling. And they could therefore have concluded that the pin lifter was defective. The jury's finding of this fact should not have been disturbed.

Mr. Justice REED, Mr. Justice DOUBLAS, and Mr. Justice MURPHY join in this dissent.

² Cf. Ridge v. R. R., 167 N. C. 510, 521; Kirby v. Tallmadge, 160 U. S. 379, 383; Interstate Circuit v. United States, 306 U. S. 208, 225-226.